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REPORTS
OF
CASES
ARGUED AND DETERMINED
IN THE
HIGH COURT OF ADMIRALTY;
COMMENCING WITH THE
JUDGMENTS
OF
THE RIGHT HON. SIR WILLIAM SCOTT,
Michaelmas Term 1798.

By CHR. ROBINSON, LL.D. ADVOCATE.

VOLUME THE FIFTH.

L O N D O N:
PRINTED BY A. STRAHAN,
LAW PRINTER TO THE KING'S MOST EXCELLENT MAJESTY,
FOR J. BUTTERWORTH, AND FOR J. WHITE, FLEET-STREET.
1806.

the rule, which will, with equal propriety, apply to all works of a similar description: " We do not mean that this work should extend to every common case that happens every day, which were an infinite labor and to little purpose, nor yet to exclude all but prodigies and wonders; for many things are new in their manner and circumstances, which are not so in their kind; and he who looks attentively, will find many particulars worthy of observation, in what seems common."

Advancement of Learning, p. 144.

Dodder's Comments, Feb. 23, 1805.

Oct. 22, 1806.

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Betley, Murphy, 22d June 1799 - -	Affirmed.
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(x)

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Betty, Cathcart, Gillespie 1st July 1800 Affirmed.
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(a) Affirmed in principle by the *Rofalia*, and the *Betty Roper*, 6th May 1802, in which the Lords of Appeal held, that the carrying contraband outwards with false papers, would affect the *returned* cargo, with condemnation.

DATES

DATES of HOSTILITIES and BLOCKADES.

Date of Hostilities.	Against.	Dates of Blockade.	Ports Blockaded.
16th May 1803	France	28th June 1803 *	The Elbe.
16th June 1803	Holland	26th July 1803	The Weser.
22d August 1803	Roman and Ligurian Republics	13th August 1803	Genoa and Spezia.
11th Jan. 1803	Spain	6th Sept. 1803	Havre de Grace and the Ports of the Seine.
14 May 1806	Prussia		Fecamp.
			St. Vallery en Caux.
			Dieppe.
			Treport.
			The Somme.
		9th August 1804	Etaples.
			Bologne.
			Calais.
			Gravelines.
			Dunkirk.
			Nieuport, and Ostend.
		25th April 1805	Cadiz and St. Lucar.
		27th October 1805	Partially relaxed, with exception of provisions and warlike stores.
		16th May 1806 †	Of the coasts from the Elbe to Brest, with qualifications in favour of neutral trade to or from a neutral port.
		26th July 1806	Venice.

* Withdrawn October 19th 1805. Renewed, 8th April 1806.

† September 25, 1806, relaxed as to Ports between the Elbe and the Eems inclusively.

ERRATA IN VOL. V.

- Page** 9. line 11. *for as read to be*
 13. — 16. *for on read to*
 22. — 5. *for on read in*
 57. Note, line *penultim dele comma*
 67. line 7. *insert comma after condemned*
 67. — *for distinction read destination*
 105. — 7. from bottom *for this read the*
 106. — 13. *for le read de*
 112. line *penult for locked read looked up*
 114. — 25. *insert id before conceditur*
 129. — 5. *for charge read change*
 130. — 24. *dele comma*
 143. — 4. *for prize act read instructions to privateers*
 143. — 11. *insert in after captor*
 144. — 5. *for prize act read instructions*
 144. — 8. *dele among*
 148. — 2. *after ship insert the Glenmore*
 162. — 19. *insert into after entered*
 178. — *ult. for procured read so issued*
 347. *ante penult, for Whitehead, read Whitehill.*

R E P O R T S
OF
C A S E S
DETERMINED IN THE
HIGH COURT OF ADMIRALTY,
&c. &c. &c.

THE JEUNE VOYAGEUR, GUERARD.

*Sept. 6th,
1803.*

THIS was a case of a *British* ship that had been seized in a *French* port March 1802, and had been condemned for an asserted violation of the *Navigation Laws of France*. It had been purchased under that sale by a *French* merchant, and was captured on a voyage between two *French* ports, since the commencement of hostilities against *France*. A claim was given on the part of the former *British* owner, praying to have the ship restored to him on salvage.

Recaptured from the enemy—
Restitution to former *British* owners, under the Prize Act, is confined to captures during the war; not to be extended to a vessel, confiscated in time of peace, for a violation of the Revenue Laws of France.

On the part of the claim, Sewell stated the circumstances of the case, and submitted to the Court, whether the restitution on salvage, directed by the Prize Act, might not be extended to the relief of a

The
JEUNE
VOYAGEUR.

Sept. 6th,
1803.

person whose property had been violently and unjustly taken from him in a *French* port, and was now retaken by a *British* subject.

JUDGMENT.

Sir *W. Scott*.—I am clearly of opinion, that it is not in the power of the Court to give this relief. The provisions of the Prize Act apply to goods taken by the enemy as prize, and direct, with regard to such property, that, on recapture, it shall revert to the former *British* owner. This ship was seized, not in any manner as prize, but for an alledged violation of the Revenue Laws of *France*, in a time of absolute and entire peace. Whether the condemnation in the *French* Court proceeded on just grounds or not, is a question which I am not competent to try; more especially in the *ex parte* manner in which it must unavoidably come forward, there being no persons present on the part of the *French* Court to defend the proceedings which have taken place. The seizure and condemnation, in time of peace, will have the effect of working an entire defeazance of the *British* title; and the ship must be condemned to the captor, as property of the enemy, taken in the ordinary course of prize.

Sept. 6th,
1803.

THE VROW ELIZABETH, PROBST.

Effect of the flag and pass of the enemy, conclusive as to the character of the ship—not conclusive against the claim of the

THIS was a case of a ship taken under a *Dutch* flag and pass, on a voyage from *Surinam* to *Holland*. A claim was given on the part of Mr. ———, a merchant of *Bremen*, stating “the ship to the same owner, for an undivided share of the cargo.

have

have been *bona fide* his property, though nominally transferred to a *Dutch* merchant, and placed under a *Dutch* flag and pass, for the purpose of enabling her to trade between the *Dutch* colonies and *Holland*.

The
ELIZABETH.

Sept. 6th,
1803.

On the part of the Captor, the King's Advocate.—The master has in his deposition stated the ship to belong to the owner in *Holland*; he cannot therefore now be heard to explain away that evidence, and assert a claim for another person. Independent of all objections to testimony, however, the mere sailing under the flag and pass of the enemy is, in point of law, decisive to fix the character of the ship, and to subject her to be condemned as a *Dutch* ship.

On the other side, Laurence and Robinson.—The discredit of the master will not preclude the owner from asserting a fair claim; more especially when a foundation is laid for such a suggestion, in the evidence of the other witnesses, who speak of Mr. N—— as being in reality the owner. The principle of law that has been relied on, applies to cases arising in time of war. The circumstance of existing hostilities may impose a peculiar obligation on neutral merchants, to keep their titles of property distinct, and free from any intermixture of enemy's interest, even in appearance; but where no such special reason exists, the principle does not apply with equal propriety, to govern cases of an assumed character in time of peace; where the flag and pass have been adopted without any contemplation of war, and for reasons arising only out of the internal regulations of *Holland*. If this practice of transferring

The
ELIZABETH.

Sept. 6th,
1803.

(a) Adm. 26,
June 1800.

transferring a *Dutch* character to neutral ships, is in any degree a fraud, it is not against this nation, nor against the rights of war, which it is the *peculiar* province of this Court to enforce. It can amount to nothing more than to a fraud on the Navigation Laws of *Holland*, which we are in no degree concerned to protect. In the case of the (a) *Clariffa*, Symonds, Mr. Brown, a part owner, resident in *America*, obtained restitution of his share of the ship, although the vessel had sailed from *Holland* under a special pass or *licence* of adoption, entitling her to engage in the colonial trade of *Holland*, which had before been appropriated exclusively to *Dutch* ships.

JUDGEMENT.

Sir *W. Scott*.—This application appears to me to be against the evidence of fact, as well as against the settled principle of law. The vessel was sailing under *Dutch* colours from *Surinam* to *Amsterdam*, with a *Dutch* pass, and all other papers, representing her to be a *Dutch* ship; and this description is confirmed by the deposition of the master, who states her to be a *Dutch* ship, the property of Mr. *Gildermester*. The evidence on the fact then is, that she is a *Dutch* ship; to this nothing is opposed, but the account of two other persons, who, though *competent witnesses*, are certainly inferior to the master, both with regard to the credit due to them, and to their opportunity of knowing the real fact. It would, I think, be extremely hazardous to admit a claim in opposition to this evidence. I will go farther, and say, that I hold the claim to be also against the established rules of law; by which it has been decided that a vessel,
failing

failing under the colours and pass of a nation, is to be considered as clothed with the national character of that Country. With goods it may be otherwise (a), but ships

The
ELIZABETH.

Sept. 6th,
1803.

(a) In the case of the *Vreede Scholts*, the claim of Mr. Dede, for a share in the ship taken under a *Dutch* flag and pass, was rejected. On the part of the captor it was farther objected, as to the cargo, that the claim of the same gentleman for an *undivided* part of the cargo, documented as *Dutch* property, must be precluded also by the *Dutch* character, and by incorporation into *Dutch* commerce. The Court overruled this objection, observing, "A great distinction has been always made by the nations of *Europe*, between ships and goods. Some countries have gone so far as to make the flag and pass of the ship conclusive on the cargo also, but this country has never carried the principle to that extent. It holds *the ship* bound by the character imposed upon it by the authority of the Government from which all the documents issue. But goods which have no such dependence upon the authority of the State, may be differently considered. Then comes the question whether the Court will make the separation. Generally, it cannot be doubted, that such separation may be made. It is in every day's practice to make such distinctions. Are there, then, any particular circumstances to prevent the Court from doing it in the present instance? Has the claimant assumed the character of a *Dutchman*, so as to render the property liable to be considered as *Dutch* property? I know of no case that has fixed such a consequence upon a transaction of this kind in time of peace. On the contrary, we all remember the cases of the *Swiss*, who had shipped property from *Curacao* under *Dutch* names, to avoid the Alien Duties, and yet obtained restitution of their claims. Had the trade in the present instance been even an exclusive trade, it might have been questionable, how far the party could have been held to the *Dutch* character merely on account of a false representation practised against the *Dutch* revenue laws—unless, indeed, it had appeared that there had been some pass or licence conferring on him the special privileges of a *Dutch* merchant, or unless it was a trade arising out of the circumstances of war, or the expectation of such an event. Here the party appears only to be availing himself of *Dutch* names in time of peace for the benefit of avoid-

Sept. 6th.

Jan. 10th,
1804.

The
ELIZABETH.

Sept. 6th,
1803.

ships have a peculiar character impressed upon them by the special nature of their documents, and have always been held to the character, with which they are so invested, to the exclusion of any claims of interest, that persons living in neutral countries may actually have in them. In the war before the last, this principle was strongly recognized in the case of a ship taken on a voyage from *Surinam* to *Amsterdam*, and documented as a *Dutch* ship. Claims were given for specific shares, on behalf of persons resident in *Switzerland*; and one claim was on behalf of a lady, to whom a share had devolved by inheritance, whether during hostilities or not, I do not accurately remember, but if it was so, she had done no act whatever, with regard to that property, and it might be said to have dropt by mere accident into her lap. In that case, however, it was held that the fact of sailing under the *Dutch* flag and pass was decisive against the admission of any claim; and it was observed that as the vessel

ing particular duties; in such a case it would be going farther than the Court has hitherto gone, to declare that the person is to be held to all the revolutions which may attend the *Dutch* character. In time of war a more strict principle may be necessary. But it is needless to decide what considerations might be fit to be applied to such a transaction in time of war; as this case arose altogether in time of peace, and without any expectation of war. I see nothing to prevent the Court from performing the office of separating this undivided share; and as the property is fully proved, I shall decree it to be restored.

So, in the *Broders Lust*, Mr. Richter, part owner of the ship, and supercargo on board the vessel, obtained restitution of his claim for parts of the cargo, though his claim as to the ship was rejected.

had been enjoying the privileges of a *Dutch* character, the parties could not expect to reap the advantages of such an employment, without being subject at the same time to the inconveniences attaching on it. When I lay down this rule, I do not say that there may not be cases of such particular circumstances, as to raise a reasonable distinction. The treaty of *Amiens* had stipulated for the liberty of withdrawing *British* property from the ceded and restored islands. But the Governments of *France* and *Holland* afterwards refused to suffer such property to be exported from these colonies, otherwise than in ships of *France* or *Holland*, and on a destination to those countries. The difficulty which has arisen in the removal of *British* property, for want of shipping, may have induced our own Government to permit *British* ships to put themselves under *Dutch* flags for this particular purpose; and in such cases the particular situation of affairs arising out of this refusal to execute the treaty, may have entitled such parties to a relaxation (a) of the general rule. But no ground of exemption whatever is stated in the present claim—nothing more than that the claimant found it *convenient* to place his vessel under the *Dutch* character: To which the answer is obvious, that with the *convenience* he must take also the *inconvenience* attending such an act.

The
ELIZABETH.

Sept. 6th,
1803.

(a) In the *Onderneeming*—A British subject obtained restitution of seven-eighths of the ship, under a *Dutch* flag and pass.—The King's instructions, 23d July, 1803, direct "Restitution of ships and cargoes, *bonâ fide* belonging to *British* subjects, sailing, before the knowledge of hostilities, from the colonies of *France* and *Holland*, to whatever country they might be going."

CASES DETERMINED IN THE

The
ELIZABETH.

Sept. 6th,
1803.

The case referred to in the argument has nothing in common with the present claim. In that case the ship had merely a colonial pass or licence, being in all other respects undoubtedly and avowedly an *American* ship, and described as such in the usual *American* documents. This ship has all the documents of a *Dutch* ship, and I have no hesitation in pronouncing her subject to condemnation.

Sept. 7th,
1803.

THE FREDERICK, WORTH.

Mariners character, concluded by the character of the ship. Shares of master and mariners, American subjects, on board a *French* whale-ship, condemned.

THIS was a case of a *French* whale ship, that was taken on a voyage to the Southern whale-fishery and back to *L'Orient*. The master claimed specific shares (a) of the cargo, as the property of himself and the officers and crew of his vessel, *asserted subjects of America*.

The King's Advocate contended,—That the character of the master and mariners were to be taken from that of the ship, and that they were precluded from claiming wages on board an enemy's ship.

Contra. Laurence cited the cases of the Ospray and the Industry in the last war (in which the masters adventure had been restored), and contended,—That as the claimants had engaged in this trade only in time of peace, it was reasonable that they should be allowed some time to withdraw themselves and their property, without being bound *instantly* to all the disabilities of a *French* character, from a mere temporary service on board a *French* ship.

(a) Master, 1-14th.—Mate, 1-25th.—2d Mate, 1-35th.—3d Mate, 1-50th.—3 Mariners, each 1-85th.

JUDGMENT.

HIGH COURT OF ADMIRALTY.

JUDGMENT.

Sir *W. Scott*.—I have no hesitation, in pronouncing that these persons cannot be admitted to claim: They are to be considered as mariners; and this proportion of the proceeds of the voyage, as their wages. Then can a claim be sustained for wages, on board an enemy's ship? In the cases cited, the ships were either *really* or *ostensibly American* ships, which might entitle the persons serving in them, in that character, to a different consideration. The present vessel is avowedly a *French* ship, and these persons must be taken as *French* sailors. There is indeed less reason for any relaxation of the general principle in this branch of navigation, than in any other; because the *ratio* of wages is a material part of the trade itself, being the ordinary mode of carrying on that particular species of commerce.

The
FREDERICK.
Sept. 7th,
1803.

THE MARIAMNE, MOREL.

Sept. 9th,
1803.

THIS was a case arising on a representation, made by the master of the captured vessel, to Captain *Trower* of the King's ship the *Lark*, that one of two privateers, that were the actual captors, had fired into the ship after the surrender, and by that act had killed one of the men. On this representation, a proceeding was instituted on the part of the Admiralty, against the privateer, to deprive her of her letter of marque. It appeared that the two privateers had dogged the prize from ten o'clock, A. M. till about two,

Letter of
marque, forfeit-
able for acts of
Cruelty—Pro-
ceedings on that
ground, on the
part of the ad-
miralty, not
substantiated in
the present case.

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two, and were close under her stern when she surrendered; that they immediately boarded and took possession. The *Lark* had come in sight about an hour before the capture, and the master of the *French* ship deposed, "*that he struck to the Lark,*" though at a considerable distance at the time of surrender. In consequence of the representation of this witness, Captain *Trower* dispossessed the prize-master, and put his own men on board, and communicated to the Admiralty the information on which this proceeding was grounded.

JUDGMENT.

Sir *W. Scott*.—This is a proceeding in order to deprive a privateer of her letter of marque, in consequence of improper conduct. The fact alleged is of a very atrocious kind, and would, certainly, if proved, draw with it all the consequences that have been pressed against the parties. During the contest, destruction is necessary and lawful; but it is contrary to every principle of the law of nations, that, after the contest has ceased, hostile and destructive force should still be continued. The only thing that I have to consider is, the proof of the fact, because the law is laid down by the Prize Act, which expressly inflicts upon all acts of cruelty, *the forfeiture of the letter of marque*; and *this*, I consider to be no more than a formal declaration of what was the ancient law of the Admiralty.

On the fact, which the use of this unnecessary violence would amount to, I cannot say that it is in any degree satisfactorily established. In the first place it must be considered as *a very unnatural conduct*, and as such, it will not unreasonably require strong evidence

evidence to support the accusation. No advantage could be derived from it; on the contrary, it would be likely to produce great inconvenience to the parties themselves, who were injuring that which was now in their possession, and in a certain degree their property. It is not very congenial to the known practice, and disposition of *British* sailors. These considerations very much heighten the incredibility, and call for some very strong testimony to sustain the charge. All the evidence that is produced on that side consists of the affidavits of three *French* seamen, and of the observation made by a *British* officer, on the appearance of the *French* vessel after the capture. The *French* captain's deposition in preparatory, by no means comes up to the allegation. He says, "that he struck to the *Lark*, at the time when "the two luggers were firing into his ship;" this is a very different thing from a shot fired after the surrender was clearly notified and understood, and can never constitute a ground for penal proceedings against the captors. The two other witnesses were not examined till nearly three weeks after the capture. They do indeed lay some foundation for the representation made by Capt. Trower. The mate of the *Lark* also states, in his affidavit, "that he perceived the body of a man upon the deck, warm and with the blood flowing;" but the effect of this representation is very much weakened by what ensued. It might reasonably be expected, that the first topic started, after the mate came on board, would have been a formal remonstrance and complaint, on the part of the master of the *French* merchantman, against such conduct. But not a word passed upon the subject; nothing transpires till after some time had elapsed,

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MARIANNE.

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elapsed, and, after an altercation had taken place between Captain *Trower* and the master of the privateer, respecting the possession of the vessel. It seems, that the *French* master was ambitious to strike to a King's ship, agreeably to what we have seen in other cases of a prevailing (*a*) vanity of this kind : They prefer a submission to a more splendid victor. He says, " that he could have escaped the privateer, if the *Lark* had not cut off his retreat into a *French* port." Of that there may be reason to doubt. However, the *Lark* came in fight ; the privateers, which had been chasing for some time, and before the *Lark* came in fight, got first on board, as they had a perfect right to do. It must not be imagined that there is, in this respect, any difference between a King's ship and a privateer. They are both engaged in the same contest ; they both represent the public force of the country, and are both armed with public authority. The privateer coming up first had a right to take possession, and if resistance had been offered by the *French* captain, it would have justified any violent consequences that might have ensued. The enemy has not a liberty of choosing to whom he will surrender ; when the surrender is once compelled, he is bound to submit to the first armed cruiser that comes up. Considering the temper displayed by the *French* master, and seeing that his testimony is positively contradicted by other parts of his own crew, (who have united in an affidavit, stating, " that the person

(*a*) Instances of a similar prejudice occur in proceedings in the earlier part of the last century.

supposed to have been shot after the surrender, had in fact fallen some time before, and during the engagement,"") I am of opinion, that it is by no means satisfactorily proved, that an act was committed, which would not only produce the penal consequences alluded to, the forfeiture of the letter of marque, but would also fix a stigma on the parties for life. At the same time, I impute no blame to Captain Trower; he has acted with an honourable zeal for the credit of the public service, on the representation of the *French* master. Had he enjoyed a better opportunity of weighing all the evidence together, he would, perhaps, have found reason to form a different conclusion. There is no reason, however, to impute the least degree of blame to him; neither do I think that the *admonition* called for, on the King's *officers*, is rendered necessary, by any disposition shewn in this case, to arrogate to themselves all prizes made in their presence, to the exclusion of private ships of war, that may happen to be the actual captors. The officers of King's ships must understand, and doubtless do understand, that they have no authority to dispossess privateers. Such vessels are duly commissioned, and represent the public authority. The King has been pleased to communicate his bounty to them, and they stand generally, with respect to an interest in prize, on the same footing, as other parts of the public force of the Country. With regard to the charge alleged, I pronounce it not to be made out, and dismiss the parties.

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MARIAMNE.

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1803.

Oct. 6th,
1803.

THE JONGE AREND, KNOWLES.

Licence, for importation from the enemy on board a neutral ship, vitiated by the ship being British property.

THIS was a question respecting the effect of a licence, which had been obtained by *British* subjects, for the importation of sundry articles, from the port of the enemy, "*in neutral ships*;" whether it was to be extended to the protection of such a trade carried on in a *British* ship. The vessel was sailing under *Prussian* colours, and was claimed for Mr. *Abegg*, of *Emden*.

JUDGMENT.

Sir *W. Scott*.—This is a mere question of property as to the character of the ship, since the licence being *for importation on board a neutral ship* cannot afford protection, if this vessel is to be considered as a *British* ship. There are many reasons why Government might not be disposed to permit *British* ships to trade with the enemy, at the same time, that a communication in neutral bottoms might be allowed. It would be infinitely too much for this Court to take upon itself to say, that because Government has admitted the one, the other is to be taken as virtually included. By all the evidence it appears, that this is a *British* ship. The trade which has been carried on, is, therefore, neither protected by the reason, nor by the terms of the licence; and the property must be pronounced subject to condemnation.

THE

THE VROW ANNA CATHARINA, MAHTS.

OS. 7th,
1803.

THIS was a case of a ship and cargo, documented as Dutch property, and captured on a voyage from *Batavia to Amsterdam*, near to the island of *Saint Michael*. On a representation made to the *Portuguese* Government, that the seizure took place within the road, or harbour of *Saint Michael*, a claim of territory was interposed by the *Portuguese* Consul.

Claim of territory, on the part of the Government of *Portugal*, not substantiated as to the fact of the place of capture.

On the part of the Captor, Arnold.—There is no foundation for any such claim on the preparatory depositions; all the witnesses “represent the capture to have been made *on the high seas*, as they were making for *Saint Michael* for water, within sight of several ships lying at anchor in the Bay, at the distance of about one *English league*.”—The second witness says, “*a little more than a league*;” and the third witness, “*about three English miles*.” The whole of the preparatory evidence gives a different account of the place of capture, from what is now endeavoured to be represented, *as within the roadstead, and whilst the ship was lying at anchor in the port of Saint Michael*. To admit other evidence on this point, that has no foundation laid for it in the original case, would be extremely dangerous and unusual. It is therefore hoped that the Court will pronounce this claim to be entirely unsustainable, and reject it with costs.

On the other side the King's Advocate and Laurence.
—The distance stated in the deposition is not greater than the ordinary extension ascribed to territory, by
the

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the law of nations ; all that is said is, that the capture was made on the *high seas*, and near to *Saint Michaels*. This description is by no means incompatible with the fact, of its being within the protection of land. Unless the evidence is clearly contradictory to the representation of the claim, the Court would not, in a case of this description, shut out the farther evidence which is now proposed to be offered, in the letter of the *Dutch* Consul at *Saint Michael's*, and the protest entered by the master at the time ;—from which evidence it will appear, at least, that this is not an *ex post facto* suggestion, but one arising out of the impression of the parties upon the spot.

JUDGMENT.

Sir *W. Scott*.—The sanctity of a claim of territory is undoubtedly very high. The Court is at all times very much disposed to pay attention to claims of this species, and to none more readily than to those, which concern the territorial rights of the State of *Portugal*. When the fact is established, it overrules every other consideration. The capture is done away ; the property must be restored, notwithstanding that it may actually belong to the enemy ; and if the captor should appear to have erred wilfully, and not merely through ignorance, he would be subject to farther punishment.

It is to be remembered however, at the same time, that it is a point on which foreign States are extremely liable to be misinformed and abused, by the interested representations of those, who are anxious to catch at their protection. The claim of territory is therefore to be taken as a matter *stricti juris*, and to be made

out by clear and unimpeached evidence. The right of seizing the property of the enemy, is a right which extends, generally speaking, *universally*, wherever that property is found. The protection of neutral territory is an exception to the general rule only; it is not, therefore, to be considered as disrespectful to any Government, that the fact on which such claims are founded should be accurately examined.

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In this particular instance, it is, I think, very evident, that some kind of misrepresentation has been practised upon the Government of *Portugal*; since there is the widest difference, between the depositions of the captured crew, and the claim that is now offered, on the part of the *Portuguese* Consul, *for this ship, as lying within the roadstead of Saint Michael*. In the affidavit which has been rather irregularly brought in, the utmost that is now averred is, "*that the ship was preparing to anchor, that the crew were clearing the ship,*" which every body knows, is an act usually done previous to the actual arrival in port. This account, however, is very little conformable to the original depositions, which represent the capture to have taken place *about a league, or a little more than a league, from the ships at anchor in the bay*. On this evidence no doubt could be entertained. Then what is since offered? The affidavit represents the distance only as *within three-quarters of a German mile*. The utmost extent which is given to this immunity, even in books, is confined to about three *English* miles; so that, at last, the representation is nearly to the utmost extent of the limits prescribed for claims of this kind, supposing the measure to be minutely ascertained. If the fact had been, that the privateer had made this capture in a neutral port, or whilst lying in harbour, as was done

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CATHARINA.

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in some of the ports in the north, with a view of making that harbour an habitual station for captures, I should have concurred in reprobating such a practice in the strongest terms; but if, whilst a privateer is accidentally lying there, she sees an enemy approaching, she may go out and capture, I conceive, without any violation of the peace or immunity of the neutral port, provided this is done beyond the limits of the port. If this had been a proceeding originally instituted by the Government of *Portugal*, on the suggestion of the officers of that Government, who had witnessed the transaction on the spot, and had immediately put forward their remonstrances, as happened in some *Danish* claims, there might be ground for admitting a further investigation of the charge. But it is now exhibited only on the representation made by the *Dutch* Consul at *St. Michael*, who may naturally be supposed to be not unwilling to extend to his countrymen any protection that it might be in his power to afford. Under these circumstances the claim of territory, being altogether contradicted by the *preparatory evidence*, must be rejected.

On the merits, it was contended—That all the documents, as well as the depositions of the *Dutch* crew, described the cargo to belong to *Dutch* merchants, and it was prayed that the Court would condemn the ship and cargo as *Dutch* property.

On the other side.—A claim was offered for *A. B.* a neutral merchant, setting forth his interest in the cargo, under a subcontract made to him by the *Dutch* merchant, who was the original purchaser in the contract with the *Dutch East-India Company*; and it was contended,

contended, that the rule of not admitting claims in opposition to the original papers and depositions, was a rule arising out of the relations of war, and was not to be applied to a transaction which took place altogether in time of peace.

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JUDGMENT.

Sir *W. Scott*.—I have never understood that the rule against the admission of claims, which stand in entire opposition to the papers, and to the preparatory examinations, was applicable to cases arising before the war. There may be private reasons to induce merchants to trade under borrowed names, and to suppress the exact representation of the property. In time of war, the rule is certainly otherwise, as it would open a door to fraud in an incalculable extent, if persons were not required to describe their property with perfect fairness. The interests of a third party interpose, and call upon them so to do. It is not any relaxation of the rule, therefore, to admit such a claim for property shipped, and *purchased*, as it is asserted, in time of profound peace. In Mr. *Allwood's* (a) case the same distinction was recognized; and indeed the objection has never, to my knowledge, been held to be a decisive objection, as applied to such cases. I shall admit the claim, and give the parties an opportunity of enabling me to form a better judgment of this transaction, by shewing what was the particular nature of this contract (b).

(a) *Superb*,
6th Aug. 1800.
—*Lotus*.

(b) This property was afterwards restored. *Vide infra*.

Nov. 2d,
1803.

THE PHCENIX, WILDEBOER.

Produce of the claimants estate in the colonies of the enemy, subject to condemnation, though it be bona fide the property of claimants personally domiciled in neutral countries.

THIS was a case of a claim, given on behalf of persons in *Germany*, for property taken on a voyage from *Surinam* to *Holland*, and described to be the produce of their estates in *Surinam*.

On the part of the captors, the King's Advocate relied on this circumstance, that the articles in question were described as the produce of the claimants' estates in the colony of *Surinam*; and contended that it was an established principle of the Prize-Court, that such property was to be considered under the national character of the parent state.

On the other side, Laurence and Robinson. Whatever may have been the strict principle of law in former times, and on ordinary occasions, as to the produce of the claimants' plantations in the enemy's colony, the circumstances of the present times afford a reasonable ground of distinction. This colony had very lately been in *British* possession; and the Treaty of *Amiens*, that provides for its restitution to *Holland*, stipulates at the same time, that all persons should have three years to remove their effects. This may reasonably be considered as a sufficient ground of equity, to prevent the inhabitants, of any class, from being instantaneously implicated in the war; and should at least entitle them to some time for deliberation, and for withdrawing themselves and their property.

JUDGMENT.

JUDGMENT.

Sir *W. Scott*.—If the claimants had averred, that they made their establishment at *Surinam* during the time whilst the colony was under *British* possession, the question would have arisen whether the terms of the Treaty, which are very general, and not confined to *British* settlements only, should be construed to apply to the property of (a) all persons making their establishment there during that period. It is *not* averred, that the claimants *had become* possessed of these plantations during that time. They only say, that the plantations had fallen to them by descent and devolution of the estate of a person in *Holland*. Certainly, nothing can be more decided, and fixed as the principle of this Court, and of the Supreme (b) Court, upon very solemn arguments there, that the possession of the soil does impress upon the owner the character of the country, as far as the produce of that plantation is concerned, in its transportation to any other country, whatever the local residence of the owner may be. This has been so repeatedly decided both in this and in the Superior Court, that it is no longer open to discussion. No question can be made upon the point of law at this day. In the present case the estates are described to have been acquired by descent; and as such they are by no means marked out as entitled to any favourable distinction. If they had been a late acquisition, there might have been room for the supposition, that they had been acquired whilst the place was in *British* possession, and that the owner had been induced, by that circumstance, to form an establishment there, under the faith and protection of the *British* Government. Having fallen by descent on

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(a) *infra*, *Diana*.

(b) *Maagrom*,
Juffrouw Catharina, and other
cases. —*Lords*,
1783.

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these persons from their ancestors in *Holland*, these plantations must be considered to carry with them the disadvantages, as well as the advantages, of the *Dutch* character. Nothing is averred respecting the time of possession, and therefore the question in the Treaty cannot arise. As the produce of the claimants' own plantation in the colony of the enemy, this property must fall under the general law, and be pronounced subject to condemnation.

Dec. 13th,
1803.

Claim on the part of the *Batavian* republic, under the asserted protection of a licence granted by the *British* Government *October* 1801, rejected; the licence not being held applicable to the case of a new war.

THE PLANTER'S WENSCH, TOLL.

THIS was a case of a claim made for property, avowedly *Dutch*, by a person represented as an accredited agent of the *Batavian* Republic. The claim was given for the ship and for parts of the cargo, as sailing under a licence granted by the *British* Government, *October*, 1801.

On the part of the captors, the King's Advocate and Robinson.—This claim is given for a *Dutch* ship, sailing under *Dutch* colours, from *Demerara* to *Amsterdam*, and seized (*May*, 1803) prior to hostilities against *Holland*. It is claimed as protected generally by the Treaty of *Amiens*, and, adly, in a more specific manner, by the licence which was on board. The licence is dated *October*, 1801, and expresses a permission for this vessel to sail from *Amsterdam* to *Demerara*, in the ensuing *April*, in pursuance of the preliminaries of peace. It was granted between the signing of the preliminary articles and the definitive Treaty;

Treaty; and must, in its obvious intent, have been designed only to enable *Dutch* vessels to go to the *Dutch* settlements, whilst still under the dominion of this country, prior to the surrender that was expected to take place on the return of peace; and under an understanding, (as it has been reported), that the *Dutch* Government would licence an equal number of *English* vessels to go there, after the signing of the Treaty, for the purpose of bringing away *British* settlers and their property. Whatever might be the understanding of the two Governments as to that last article, which was afterwards refused to be carried into effect, it cannot be contended, that a licence, granted at this time, with reference either to the war which was just on the point of being concluded, or to the expected state of peace, should be construed to extend to the protection of *Dutch* property against the events of a future war. Under what views could such an intention be ascribed to Government? The disposition of this country towards *Holland*, with reference to past events, might be well known, and capable of being minutely appreciated. But who could foresee how that disposition might stand affected in the event of a new war? What ground of assurance could there be, if a future war is to be supposed to have been in contemplation, that it might not arise in consequence of some provocation on the part of *Holland*? It cannot be maintained as a sound interpretation of this licence, that it could be supposed to apply to the contingency of a new war.

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PLANTER'S
WENSCH.

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On the other side, Laurence and Swabey.—This is a capture made before hostilities, and as such, it will not

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vest an interest primarily in the captor, but in the King. If, therefore, any doubt should be entertained respecting the intention and legal effect of the licence, under which this vessel was sailing, it may be a case more fit to be referred to the liberal and merciful consideration of his Majesty. The intention of the licence was very different, as it is understood by the claimant, from the construction put upon it by the captors. It was granted during an uncertain state of negotiation between the two countries, and with a design that, if that ambiguous situation of affairs should again terminate in war, it might serve for the protection of the vessel sailing under it. Whether it might be fairly construed to extend to hostilities entirely new, and independent of the negotiation which was then going on, it may not be necessary to enquire. Since the present war has arisen out of the inefficacy and inexecution of that treaty, the state of affairs between the two countries is rather to be considered in the same light as if the former hostilities had never ceased; and this licence as still operative for the protection of the vessel during the voyage on which she was captured. That the licence had this prospective view to a *renewal* of hostilities, and that it was *not* granted with reference only to the restrictions of the colonial system, is evident from the terms in which it is addressed:—"To all admirals, vice-admirals, cruizers, &c." The parties are therefore entitled to the benefit of its protection from a capture, which is rather to be considered as an act under the continuation of former hostilities, than as proceeding from a new war.

JUDGMENT.

JUDGMENT.

Sir *W. Scott*.—This claim is given by a Mr. *Apostol*, who is described as the commercial agent of the *Batavian* Republic, though it is not very easy to understand how that character, springing out of the pacific relations of the two countries, can now exist in a time war. Waving, however, all objection to the political description of this gentleman, I will consider the nature of the claim, and the ground on which it is defended. It is represented as sustainable under the treaty of *Amiens*, and on the special licence which has been produced. As to the treaty of *Amiens*, the argument on that head would amount to this, that all property taken before the actual declaration of future hostilities, should be protected by it;—a position, which it is, in my opinion, impossible to maintain. The second ground is that of the licence;—a protection which, if it could be shewn to apply to this class of cases, would be entitled to the greatest respect, and would certainly meet with every disposition, on the part of the Court, to give it due effect. The licence was granted in *October* 1801, to empower this vessel being a *Dutch* ship to go to the colony of *Demarara*, then in *British* possession, but intended to be restored to the *Batavian* Republic, under the treaty then in contemplation. Whilst the island was in *British* possession, it was certainly an indulgence to allow *Dutch* vessels to sail with this destination, on which they could not have ventured without the special protection of a licence. It must be recollected also, that it was granted during the pendency of the negotiation—whilst it was uncertain whether hostilities might not be renewed, and whilst it was probable

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bable that the cruizers then in commission might retain their legal authority to seize; and therefore the terms of the licence are, I think, to be referred to the state and condition of affairs, as they were at that time existing. All those prospects of renewed hostility certainly ceased; and although the train of events has led to fresh hostilities, the Court cannot consider them as the revival of old hostilities, but as a war *de novo*. The former war was absolutely concluded by a total and entire peace, which was recognized by the Legislature, and *by which*, I am bound to look upon that war, as being as effectually, in all legal consideration, buried in oblivion and extinguished, as any hostilities of any anterior times of the world. It does not become me to speculate upon the causes of the present war, nor to consider how far it may be supposed to originate out of the seeds of those hostilities, which had been formally terminated. Peace having been concluded, this licence was necessarily done away and destroyed, having no subject matter to act upon. At the time of seizure, therefore, this vessel was to be considered on the ordinary footing of other *Dutch* ships.

This appears to me to be the legal view of the question. Whether any thing has passed between the Government of this Country and the *Batavian* Republic, that should entitle the claimants to contend for restitution under a capture of the present war, is for the consideration of those who have to advise his Majesty as to the political relations of the State. If any such pledge has been given, it will, I doubt not, be redeemed with that good faith, which has always marked the proceedings of the *British* Government. It is sufficient for me to say, that nothing is produced

to

to the view of this Court that can in fair legal interpretation have the effect of distinguishing this vessel from other *Dutch* property taken prior to hostilities, or that can protect it from the just effect of capture, made in contemplation of the war which is now actually existing.

The
PLANTER'S
WENSCH.

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1803.

THE FORTUNA, RHODE.

Nov. 4th,
1803.

THIS was a case of a ship bound ostensibly from *Stettin* to *Bremen*, but seized and proceeded against for a violation of the blockade of the *Wefer*.

Blockade of the
Wefer—Excuse
of want of pro-
visions, and un-
favourable
winds, how con-
sidered.

JUDGMENT.

Sir *W. Scott*.—In this case it is admitted that the master was apprized of the blockade. The excuse offered is, that he had taken a pilot on board to carry him into the *Eems*, but that owing to want of provisions, and a strong westerly wind, he was compelled to make for the *Wefer*. The want of provisions is an excuse which will not on light grounds be received; because an excuse, to be admissible, must shew an imperative and over-ruling compulsion to enter the particular port under blockade, which can scarcely be said in any instance of mere want of provisions. It may induce the master to seek a neighbouring port, but it can hardly ever force a person to resort exclusively to the blockaded port. What is stated, respecting the wind is of a different nature. It is said, "that there had been a strong westerly wind blowing for nine days together, which prevented the
master

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FORTUNA.

Nov. 4th,
1803.

master from making his course to the *Ecu.*" This is a fact that may admit of specific evidence, and therefore I shall admit affidavits to be offered on that point. In some late cases, I have seen enough to induce me not to admit affidavits on mere matters of conversation, asserted to have passed between the parties at the time of capture. All that is offered from such sources is generally represented so vaguely, and with so much fluctuation, as to disable the Court from extracting any precise information from it. Where a specific fact is relied on, which may be capable of proof, it is a different thing. Considering the reference that has been made to the particular state of the winds in the present case, to be of that nature, I shall admit evidence to be introduced on this point.—

This ship was finally restored.

Nov. 10th,
1803.

THE CORNELIS AND MARIA, ZORTLIEF.

Trade, on the part of *British* subjects, beyond the *Cape of Good Hope*, in violation of the *East-India Company's* charter.—Distinction as to a *subcontract* under a commercial adventure of *Dutch* merchants over-ruled.—Condemnation.

THIS was a case of a claim given on behalf of Messrs. *Eden and Court*, of *London*, for a portion of this cargo, taken on a voyage from *Batavia* to *Holland*, as purchased under a subcontract with *Voute and Co.* of *Amsterdam*, who had originally contracted with the *Dutch East-India Company* for the purchase and importation of a large quantity of *Batavian* produce into *Holland*.

On the part of the captor, the *King's Advocate and Arnold*.—In the first place it is to be observed that the claim

claim is against all the evidence, since the whole cargo is represented in the ships papers, and also in the depositions, as *Dutch* property. But the very nature of the contract, which is now represented to have been made, would subject those goods to be considered in a *Dutch* character, whoever might be the holder of the real interest in them. It is a contract for the sale of *Dutch* colonial produce, under a stipulation that it shall be imported into *Holland* in *Dutch* ships, be deposited in the Company's warehouses, and sold at their sales, bearing from these circumstances every mark of *Dutch* property, and of *Dutch* commerce throughout. As against the claim of *British* merchants, there is also this farther objection, which is, itself paramount and fatal, that on the part of *British* merchants, it is a trade directly in violation of the *East-India* Company's charter, which prohibits *British* subjects from trading beyond the *Cape of Good Hope*, unless under a licence from the Company.

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33 G. 3. c. 52.
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Court.—I should wish the defence to be directed chiefly to that point, because, unless I am satisfied on that, other considerations may be superfluous.

On this point, Laurence and Swabey.—The Acts of Parliament which have been made, from time to time, for the protection of the *East-India* Company's privileges, and are consolidated in the late Act, 33 G. 3. c. 52, are by no means to be applied to such a case as the present. They forbid a trade to the *East-Indies*, which must be understood of a transaction of persons going or sending goods to that quarter of the world to barter, or purchase for their

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own account. This is merely a contract for the delivery of certain goods in *Europe*, which were to be paid for in *Europe*. The clause of the Act of Parliament which is referred to, is confined to *such trading as is contrary to that Act*; from which we may infer that it is not *all* trading to those parts, but only such as is contrary to the intention of that Act, that is to be deemed illegal. Then what was the intention of of the Legislature? It was apparently to prohibit such traffic as was connected with *British* navigation, since the penal clause always begins by enumerating the forfeiture of the *ship* (a) amongst the penalties attaching on the offence described by that Act; and the words point rather to those personally engaged in such trade, than to persons contracting for a part of such goods when brought to *Europe*. The words of the Act are, "shall fail to, *visit*, haunt, frequent, trade, traffic, or adventure to."

In reply, it was said, that one condition of the original contract was, that part of the payment should be made in *Batavia*, and in a certain proportion in *European* goods, and that other goods shall be brought to *Holland*. That such a trade came strictly under the terms *trafficking or adventuring to*, both on the part of the original contractor, and also of those who take a subordinate share in the speculation.

JUDGMENT.

Sir *W. Scott*.—This case stands on the admission of a claim, on the part of *British* merchants, for property acquired under the contract which has been before described.

described. I shall consider it with respect to *British* merchants only; as particular considerations applying to their case, may make it unnecessary for the present to enter into the other parts of the argument, which are of wide extent, and may perhaps be brought forward again, in the claims of neutral merchants. The original contract which was made between *Voute* and the *Dutch East-India* Company, for want of means to continue their own trade, stipulates, that the goods should be brought to *Holland*, subject to all the regulations of the Company in *Europe*; and with a view of facilitating this project by increasing the capital, a permission is given to the original contractors, to parcel out and distribute a share of this contract to others. Under this power it is that *British* merchants have been let in to partake in this speculation, as merchants call it. That this is a trading contract cannot be denied. It is a trading adventure in the most plain terms; and it has strongly impressed itself on my understanding, that those who are let in to any share of the undertaking, stand on the same ground as the original contractors; and that if it is a trading adventure on the part of the original holders, it must be equally so on the part of those who come in to take a part with them. If I am right in this view of the matter, the only question will be, Whether it is not such a trade as falls directly under the prohibitions of the Act of Parliament. Under the evident *policy* of the Act, it appears to me to be a trade, in which a *British* merchant could not be at liberty to engage; and the terms, in which the Act is framed, seem to me to apply with great propriety to transactions of this nature. It is, surely, no reasonable

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reasonable ground of objection, that particular clauses begin by enumerating *ships*, amongst the things specifically subjected to confiscation. There is no inconsistency under the large interpretation which is, according to my apprehension, to be given to the policy of this Act, that where *ships* are sent, they should be pronounced subject to confiscation; at the same time, that where ships are *not sent*, these words should not be understood to convey any limitation to the general prohibition of other traffic. It appears to me, that the employment of *British* capital, in such a rival trade, is that which the policy of the Legislature meant to prohibit. With this view those Acts were passed that related to the *Ostend* Company, to discourage the support and maintenance of foreign Oriental Companies, by means of *British* capital. Is not this trade of the same nature? Is it not, under the distress of the *Dutch* Company, to create a diversion of *British* capital to aid and assist the Company of *Holland*? It would, in my apprehension, be very much in opposition to the policy of the Legislature, as well as against what I conceive to be the literal prohibitions of the Act, if I were to take upon myself to admit such a claim, and thereby to fix, in any degree, an interpretation in favor of such a trade.

Claim rejected.

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THESE were cases of *Spanish* ships detained under a charge of resistance to search, but restored with demurrage, and compensation to the crew, for improper treatment received at the hands of the captors.

Resistance to search, not substantiated, as a criminal act, against neutral ships sailing prior to hostilities, and, at the time of seizure, ignorant of the war.

JUDGMENT.

These cases arise on the capture of two vessels apparently *Spanish*, but alleged to be subject to condemnation, on account of resistance to the exercise of visitation and search, on the part of the belligerent cruiser. The principle of law on this subject is fully established and admitted on all sides. It is, indeed, a principle which has found its way into most of the maritime codes of civilized countries. It has undergone much discussion lately, and the consequence has been to give additional sanction to the principle, and to establish it more firmly in practice.

The only question then turns upon the fact; and among the facts necessary to bring the case within the operation of the law, it must be shewn, in the first instance, that the vessel had reasonable grounds to be satisfied of the existence of a war; otherwise there is no such thing as neutral character, nor any foundation for the several duties, which the law of nations imposes on that character. It is, therefore, a very material circumstance in this case, that, at the time of sailing, no war was supposed to exist, in the knowledge, or contemplation of those who commanded these vessels. They sailed in perfect

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ignorance of war, and consequently unconscious that they had any neutral duties to perform. It is sworn, likewise, that reports had prevailed of pirates being at sea, which might naturally increase the dread which *Spaniards* usually entertain of *Barbary* cruizers. In this state of alarm a sail was descried, at a considerable distance from land, but not in any place so remote from the scenes that *Barbary* pirates usually haunt, as to carry a necessary conviction that the ship could not be a pirate. The masters had no reason to expect a belligerent cruizer; and their first impression, on seeing a ship of war, might naturally be, that it was one of those irregular cruizers, against which their duty to their owners, and to their country, called upon them to use every mode of defence. Whether the privateer was sailing under *English* colours, is a point disputed in evidence; but if she were, it is so ordinary a mode of deception to wear false colours, that little reliance could be placed upon that circumstance; more especially as the war being unknown, no such thing as a *British* privateer could reasonably be expected to appear. The boats approached, and according to the preponderancy of the evidence, I think, without any colours flying. A conversation ensued. All the witnesses depose, and especially a gentleman, to whom I pay particular attention, as a passenger who was employed to act as interpreter on the occasion, "that on being asked what they wanted, they answered, to come on board;" to which it was replied from the *Spanish* vessels, "that if they had any thing to say, they might speak." Certainly it was not necessary for the purpose of information, that they should have gone on board.

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This conduct might reasonably suggest to the *Spanish* masters very just apprehensions of admitting a number of armed men on board. Another boat came up, and demanded to go between the two ships, which was not permitted, and in my opinion such caution was by no means improper, till the parties were satisfied that the business of these boats was not of a piratical nature. The whole of this proceeding is surely as different as possible, from a case of criminal resistance to a lawful cruiser; since there is no reason to suppose that the vessels knew, either that the assailants were commissioned cruisers, or that they themselves had any neutral duties to discharge. Nothing more passed, than that this request to come on board was refused. There was no refusal of papers, since it does not appear that they were ever demanded. The boats, instead of pursuing their enquiries further, returned to their ship; and, *then*, the *Spanish* vessels, certainly, indicated a disposition to escape. On a supposition that these visitants were *piratical* cruisers, there was nothing else to be done. Even if they were known to be *commissioned* cruisers, I am not aware that a mere attempt to escape, before any possession assumed, has ever been held to draw with it the consequences of condemnation. Considerable stress has been laid on what passed in conversation with the *Spanish* masters. It is said, "that they expressed themselves apprehensive of a war with *Spain*, if *Great-Britain* was at war with *France* and *Holland*," and therefore it is inferred that they had determined to escape, and under a conviction that these cruisers were *British* privateers acting under a regular commission of war. I cannot say that it appears to me unnatural, that they might suspect

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the truth of what was told them, of this country being at war with *France* and *Holland*, and not with *Spain*.

But what would be the consequence of such an act, not that they were guilty of any violation of neutrality in this attempt? To support that imputation, they must have had reason to suppose *themselves neutrals*, and not *enemies*. Therefore, in either point of view, whether we suppose them to have acted from the original suspicion of the persons being pirates; or resort to their suspicion of a war with *Spain*, in either case, if the acts of resistance had been much stronger than they appear to have been in the conduct of these parties, they would have been acts of innocent misapprehension only. On this point I am of opinion that the captors have not sustained their charge. —On the question of property there is scarcely room for any suspicion.—The ships are *Spanish* ships, and are so admitted to be, coming from a *Spanish* colony to their mother country. It did indeed occur in the last war, that foreigners were sometimes admitted to trade at the *Havannah*; but I am not aware of any case, in which it appeared that the old established trade from the colony to *Spain* was opened to any but *Spanish* subjects. If there had been such a relaxation, however, it would be but reasonable to suppose, that at the restoration of peace, the trade returned again to its ordinary channel. Every presumption, therefore, is in favour of the supposition, that the cargo belonged entirely to *Spanish* subjects. It might happen, indeed, that other interests were protected under cover of the *Spanish* name, and if any one stood forward to assert such a fact, it would be for the Court to determine on the legal consequences of such a transaction,

transaction, and to discuss the whole question. But here there is no such averment, nor any suggestion of any other than *Spanish* interests. The masters would not be required to speak with the utmost precision, as to the property of goods laden in time of peace; but these masters *do* speak with full confidence of *their* belief, that it is *Spanish* property, and refer to the *Spanish* register, which, every one knows, is an instrument of considerable solemnity. On the question of property then, as well as on the other question of resistance, I have no doubt in decreeing restitution. It remains only to consider the charge of improper conduct, which has been made against the captors. In the behaviour and deportment of these vessels, there might, perhaps, have been just cause of seizure, and bringing in for enquiry; but when the facts had been examined, when the property had been proved to be *Spanish*, and a reasonable explanation had been given, of the apparent resistance, they ought to have been immediately restored. There was, I think, ground for enquiry; and if that enquiry had been pursued in a proper manner, and had terminated in proper time, I should have held the captors fully justified in what they had done. But the subsequent proceeding here has been very different: The vessels were brought to *Falmouth* on the 12th of *August*; and the first question to be asked of the captors, and to which the Court is bound to require a satisfactory answer, is, why were no proceedings instituted till the 12th of *September*?—It must be understood by those who arm themselves with the commission of their country, that if they bring neutral ships into *British* ports, they must on no

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account detain them there without enquiry. Grievous would be the injury to neutral trade, and highly disgraceful to the honour of our own country, if captors could bring in ships at their own fancy, and detain them any length of time, without bringing the matter to the cognizance of a Court of Justice. In the present instance this first and fundamental duty has not been performed. For a whole month, the obligation of taking the examination of witnesses, at the first moment, has been disregarded; and all the excuse offered, is some strange misapprehension about the want of a qualification in the commissioners to examine a *Spanish* crew, without a *Spanish* commission; which might have been instantly removed by application to the Actuary. The delay is therefore, in the first stage, imputable to the captors; and if any inconvenience arises to the neutral merchants, it is no answer to say, that it was owing to a mistake. Persons venturing to take out a commission of war, must instruct themselves in their own duty, and if any inconvenience arises from their neglect, the neutral claimant is not to suffer. When the vessel was brought to *Falmouth*, the Agent, went down from *London*, and instead of proceeding as he ought, immediately to the examination of witnesses, he employed himself in taking the affidavits of the captors. I do not say that such a step was absolutely wrong; it might be a proper precaution; but it should have been performed at the same time, that the more important measure of taking the examination was going on. Instead of that, these affidavits are first taken; and then the Agent demands the consent of the *Spanish* Consul for the examination of witnesses; a consent entirely unnecessary, and making up

up a series of mistakes wholly incompatible with the degree of information usually possessed on such subjects. It is said that no inconvenience has arisen from this proceeding, since an application was made to the Court for the hearing of the cause in *October*. I see no reason why it might not have been heard in *September*. But when this application *was* made, it was resisted on the part of the captors; and on the ground that it would be necessary for them to introduce affidavits as to the resistance. Why were these affidavits not taken before? I see nothing in this question on which the affidavits of all concerned might not have been taken at first, as they ought to be, and not have been left to grow up, to meet the exigences of the case, as they arose afterwards. If this had been done, and the matter had been submitted to the opinion of Counsel, the Captor's own Counsel would, in all probability, have advised immediate restitution. At least the cause might have come on, and have been soon determined. Instead of that, I cannot but think that the hearing has been perversely kept off, and I shall allow for two months' detention.—There are besides two other parts of the charge, to which it is necessary for me to advert. The first is the imputation of a practice, which if proved to have existed in the extent alleged, and without necessity, must be pronounced to be disgraceful to the character of the country; since no one who hears me will deny, that to apply even to enemies modes of restraint, that are unnecessary, and at the same time convey personal indignity and personal suffering, is highly dishonourable. It is alleged in this case that the *Spanish* crew, to the number of twenty-two persons, were put in irons. This is a fact which certainly requires much explanation,

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nation, for I will not say that there may not be cases, in which such restraint may be necessary, and therefore justifiable. But the necessity must be urgent and evident. The captor, when called upon for his explanation, has furnished no apology but what is suggested by his Counsel, that these persons would naturally be regarded, as bent on their original purpose of resistance, and might, in that view, be justly subjected to closer custody. The master acknowledges that he did handcuff some, who were most outrageous, and menaced him and his officers. Admitting the motive to be truly stated, that this act was done for security, I am afraid it will not amount to a justification, because it was incumbent on the captor to pursue a proper purpose by proper means. It should be established to the satisfaction of the Court, that this species of security alone would have been sufficient for his preservation. There might have been a separation of those who shewed symptoms of violence, or there might have been a personal confinement of a slighter kind. Some such measures should have been resorted to, or it should have been shewn that they would have been insufficient. As the case now stands, the party has not made out a sufficient justification. At the same time I must say, that the misconduct appears to have proceeded rather from an improper notion of security, than from any intention to inflict pain or personal indignity. If any such malignant motive had been proved, I should have thought it my duty to pursue this matter much farther; but there is no decisive ground for such an imputation. I am of opinion, however, that the party has not justified his conduct, and that it is due to the honour of the Country, and to the injury the *Spaniards* have sustained, that some civil compen-

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compensation should be made; and with that view I decree 100*l.* to be distributed amongst the sufferers. Embezzlement is also charged; but it is said, on the other side, that some articles were withdrawn, only with a view to protect them from the eagerness of the crew, and that they will be forthcoming. Till I see how far this answer will satisfy the demands of the claimants, it will be impossible for me to pronounce upon this part of the case. I shall refer this matter to the Registrar and merchants, to ascertain the fact and quantity of loss, and I shall reserve my judgment on this question till I receive their report.

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Two months detention allowed.

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THIS was a case respecting a prize interest in a capture made by a *boat* hired by the captain of the King's ship the *Dragon*, and sent out, manned with part of the *Dragon's* crew, for the purpose of impressing mariners that were expected to arrive in the homeward-bound ships. The question was, whether a prize made by such a vessel was to be condemned as a droit of Admiralty, or as prize to the *Dragon*.

Droits of Admiralty.—i capture by a cutter, fitted out by the captain of a man of war, as a tender, and manned from his ship, but without a commission, or authority from the Admiralty, will not enure to the benefit of the King's ship.

On the part of the Admiralty, Laurence.—The Lord High Admiral is to be considered as having the grant of all prizes made without due commission. It is therefore incumbent on all persons setting up a private interest in prize to shew a title and establish their right, under the fair tenor of some commission granted to them from

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from the Admiralty, or it will naturally vest in the Lord High Admiral, now represented by the King in his office of Admiralty. The claim here given is on behalf of the *Dragon*, but the facts of this case are totally adverse to any such pretensions. It is a principle long ago decided, that a commissioned officer does not retain his commission for the purposes of prize on board another ship. This was decided in a case from *Gibraltar*, where a lieutenant on board a non-commissioned ship, at the time when a capture was made, was held to be entitled to no benefit from his commission. In the *American* war the same principle was established in the case of a capture made by the boat of a privateer lying at *Dover*, whilst the vessel was under repair, in which case the prize was condemned as a droit of Admiralty. Indeed very mischievous consequences must inevitably ensue, if the officers of ships of war could suppose themselves at liberty to dissipate their force, by distributing it into small boats, for the purpose of multiplying their chances of prize: Without pursuing this objection, however, it is sufficient to observe, in point of law, that the *onus* of proving their title lies upon the *Dragon*, as she was not in fight; that the necessary proof is in no degree supplied, and therefore that the vessel and cargo must be condemned as droits of Admiralty.

On the part of the Dragon, the King's Advocate and Robinson.—There are six other cases depending on circumstances similar to those on which the present claim is founded, except that in those other cases, the capture was made solely and entirely by the hired cutters, without any intervention of the boat of the King's

King's ship, by which the cutter was sent out. As a general argument comprehending the whole of these cases, it is submitted that the prize will enure to the benefit of the *Dragon*, not in consequence of any commission impressed on the cutter, but by her connection with the *Dragon*, as representing the actual force of the *Dragon*, being armed from that vessel, and manned by the crew borne on the books of the *Dragon*. It is not unusual for ships of war to be so attended by tenders, whose acts are considered as being as much the acts of the principal ship, as if they were performed by her own boat. In the *West Indies* especially this practice has long prevailed, with the effect now contended for. Boats are sent out to cruize, and captures taken on such cruizes are considered to belong equally to the whole ship. In some cases that have come before the Court the same effect has been ascribed to capture by boats. In the *Ghin-surab* case, the capture was made by a small boat sent up the river. In the *Odin* the capture was made by a boat of the *Trusty*, sent to a considerable distance, and entirely out of sight of the *Trusty*; there the Court expressly recognised the principle, that a capture made by a boat would enure to the benefit of the whole ship, because the officer of a King's ship was at liberty to take by more or fewer of his force. So in the *Rebecca, Thompson*, a capture made at land by the detached part of the crew of a ship of war, was condemned to the ship, the Court saying "that the capturing force under the circumstances, might be considered as a stationary tender, attached to the ship." These instances will serve to prove, that there is nothing novel in the principle, that a prize

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Vol. 4, P. 360.

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prize made by a part of the crew of a King's ship, detached from the main crew, may enure to the benefit of the ship, and be condemned to them, as prize made by captors acting sufficiently under the authority of their general commission. The case which has been cited from the *American* war was of a different nature, being the case of a privateer, in which the terms of the commission are limited and confined to *the person* of the commander, who was not on board, and to the operations of the identical ship. As to the particular object of the parties, and the consequences likely to result from such a practice, no objection can fairly be raised against the claim, on either of these grounds. The general purpose of this cruise was undoubtedly to obtain a supply of men, but still the intention of capturing was not wanting, as it is expressed by the authority taken from the Port-Admiral, *to make captures of French and Dutch ships*. The *animus capiendi*, therefore, was not wanting, though it cannot be supposed to have operated in such a manner, as to have occasioned any improper employment or disposition of the ship's crew. The tender was directed to cruise in a certain direction, with a view of falling in with the *Dragon*, when she failed from port. If it had not been that a particular state of foggy weather came on at that time, the actual capture is represented to have been made in such a place as would have been, if not in fight, at least very near the vessel, and in the exact track in which she was sailing. In the particular case of the *Dragon*, however, the right does not depend upon this general argument; since the capture in this case was actually made

made by the crew of the *Dragon*, in the boat of the *Dragon*. How they came there, whether by the assistance of another vessel, or with more or less degree of enterprize, is of no importance. It is sufficient that they presented themselves as the persons taking the property out of the hands of the enemy, and taking it, according to their intention, for the benefit of the *Dragon*;—being sufficiently authorised by the words of the Prize-Act, which give the interest in prize to the captors thereof, “being in his Majesty’s service and duly commissioned.”

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In Reply, Laurence—The words of the Prize-Act, in its enacting clause, expressly limit the grant “to persons on board of our ships of war.” The other words are merely descriptive of the intention of his Majesty, and not accurately reciting the words of the Proclamation. As to the character of the boat itself, it is impossible to consider her as the actual captor, inasmuch as the effectual surrender had been made *before* to the *Assistance* cutter; the boat being only put out to secure possession, in the same manner as the boat of the cutter might have been used. In such a situation, the boat cannot be considered as acting in an independent character, or as retaining her dependence on the *Dragon*, but as being attached to the principal force of the *Assistance*, to which the surrender was made. The practice that has been mentioned as taking place in the *West Indies*, can form no precedent, as it depends on the particular situation of ships in that part of the world. It has, moreover, never been brought before the Court in any manner so as to be sanctioned as a judicial precedent.

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cedent. In the case of the *Odin*, the boat which made the capture went out in her own distinct character, as the boat of the *Trusty*, not superseded or affected by any subsequent connection with any other ship. She went out *besides* for the sole purpose of making the capture of that particular vessel, of which intelligence had been received, and in a part of the world, where, owing to the variable state of the winds, it was particularly expedient to make attempts of that kind by means of boats, in preference to large ships.

JUDGMENT.

Sir *W. Scott*.—This case comes on upon the claim of Captain *Aylmer*, who is unquestionably a very meritorious officer, and as it appears by his affidavit, commands a very meritorious crew (*a*). If considerations of this kind could supply a principle of judgment, the case might easily be decided; but that gentleman, as well as every one else, must know, that the Court can only look to legal principles, as the foundations of a legal decision; and that whatever the personal merits of the parties may be, they cannot in any degree influence the judgment of the Court, but must be left to seek their remuneration elsewhere. It is made a question in the act of Court, and in argument, whether the capture was effected by the *Affiance* cutter, or by the boat of the *Dragon*, ac-

(*a*) Captain *Aylmer* had stated in his affidavit his long services abroad, and the zeal and attachment of his crew in refusing the bounty-money for the present war, provided that they were permitted to be continued under his command.

companied

accompanied by the cutter. All the depositions represent the capture to have been made by the *Assistance* cutter, acting, as the *French* witnesses describe her, as a tender to the *Dragon*, though this is a fact which could not be a subject of observation at the time, and could be known to them only by the report of the boat's crew afterwards. The effect of this evidence only serves to shew that the *Assistance* cutter was the actual captor. It is contended in argument, however, that the boat of the *Dragon* was sent out to take possession, and that such an act of seizure by the boat's crew of the *Dragon*, will entitle the ship herself to the whole benefit of the prize. The Court would certainly be disposed to extend, as far it could with propriety, to ships of war, the benefit of captures made by their boats, acting distinctly in that capacity. There must be situations in which the capture could not be made otherwise ; and many considerations of convenience require, that they should be allowed to take in whatever manner their judgment may deem most expedient, according to the circumstances of the case, either by their whole force, or by a part detached on that particular service. The Court would therefore not be disposed to narrow the legal effect of the operations of their boat's crew. But in this particular case it remains to be considered, in the first place, whether the boat was acting as the boat of the *Dragon* or not. The tenor of all the evidence inclines me to think that she *was not* ; that she had been detached from the *Dragon*, and attached to the *Assistance* cutter, and that she was employed in performing the same services for the cutter, as she would have performed for her own ship. If that is to be

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taken as a correct view of her situation, I cannot but accede to what has been said in argument, that a boat so detached *from one*, and *attached to another* vessel, must be taken as acting under the authority, and for the benefit of the ship to which, *at that time*, and in those operations, she *more properly belongs*. The fact appears to me to be, as it is described by the witnesses of the captured ship, "that the capture was actually and effectually made by the *Affistance* cutter, and that the boat was only used to perform such acts, as would in the ordinary course of service have been performed by the cutter's own boat."

Taking the fact to be, that the capture was made by the *Affistance* cutter, the Court has only to decide, how far the act of the *Affistance* can enure to the benefit of the *Dragon*, on which she is represented as attendant. It is an elementary principle of prize law, that all prize belongs to the State—in monarchies to the Sovereign. By modern policy this interest has been granted out to persons of certain descriptions, acting under the authority of public commissions. A very ancient grant has given to the Lord High Admiral, the benefit of all prize, taken by *persons not commissioned*; and it lies on the individual captor in every case, to shew the authority by which he is entitled to take for his own benefit. The title-deeds, on which only claims of this kind can be constructed, are the Prize Act and the Proclamation. The Proclamation confers the interest in prize "on our ships of war, and those which have taken out letters of marque." The Prize Act is much to the same effect, adding only in the last Act, "mariners, &c. on board our hired armed ships." These descriptions

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Descriptions of vessels are, with those acting under letter of marque, the only parties that can maintain a legal interest in prize. What are the circumstances of this case? Captain *Aylmer's* affidavit states that the cutter was hired at his expence, and stored and manned from the King's ship the *Dragon*." That commanding officers of his Majesty's ships may have a right to put their men arms and stores on board another vessel, I shall not question in the present case. There may be circumstances that may render it fit, in many instances, that such a discretion should be exercised, subject to the responsibility that always attends them in the discharge of their public duty. But the question which I have to consider is, whether, by so doing, an officer can be said to put that other vessel into commission, and entitle it to the privilege of being reckoned amongst the description of vessels, to which the interest in prize is given by the Proclamation and the Prize Act. Indeed I may observe, that the very claim that is set up for the *Dragon* contradicts the suggestion; because if this cutter, so employed, could be considered as *commissioned* to take for herself, she would become a constituent part of the navy, and the *Dragon* could have no interest to maintain. If then the cutter is not a commissioned vessel, the question must be, whether, not being entitled to take for herself, she does, from being so fitted out, become a boat, or, in a legal point of view, a constituent part of the *Dragon's* force? What I have said of boats may in some degree apply to tenders. If a capture is made by a tender attached by the interposition of public authority; on every principle on

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which a capture by a boat would entitle its ship, a capture made by a tender, specially employed in that capture by the ship of war to which she belonged, might, perhaps, entitle that ship. But this is not a tender attached by any interposition of public authority, but by the private act of the officer hiring and manning her himself. Is a cutter so set forth recognised by the Admiralty in any capacity? Is she borne on the books, or considered as a part of the navy of *England*? I apprehend not; she is taken up by the gentleman himself, acting from his own discretion, for good purposes no doubt, but *not in a manner* that can give such a vessel any connection or incorporation with the navy of *Great Britain*. Surely it is not to be maintained that an officer, by putting his men on board, *can* constitute a ship to be a part of the navy of *Great Britain*. Such a character is not, in my opinion, to be impressed without the intervention of some public authority. If the contrary could be held, this must follow, that an officer of a large ship might form out of these tenders as many ships of war as he pleased. He might compose a fleet. It is said that a similar practice has been not unfrequent in the *West Indies*. But every body knows, that in remote situations, the principal persons in command must necessarily be entrusted with a greater latitude of discretion. In such a situation, they must act as well as they can from their own judgment, not having an opportunity of referring immediately to the Board of Admiralty for instructions and authority, suited to the various circumstances that may occur. They grant commissions, it is to be observed, for the same reason, and if these

commissions

commissions are afterwards confirmed by the Admiralty, they rank from the original date. If a case of this description was to come before the Court from any such remote station, the Court would have to consider how far the particular circumstances would bear it out in point of validity. At home the case is very different : When an officer has it in his power to refer instantly to the Admiralty, the same effect will not follow ; nor is it to be ascribed even to the acts of an Admiral ; for it appears to me that an Admiral on the home station, would have no more power than a captain of a single ship, to constitute a tender to be part of the public navy ; though all that is done by the Admiral, in this case, is simply to give them leave to go out. A good deal has been said upon the consequences and general convenience of such a practice. It is impossible to attend much to such considerations. If I am to entertain them at all, I confess it appears to me that the *inconvenience* of such measures would very much preponderate. More captures, it is true, might be made, but what would be the general effect ? If every merchant ship might fall out and take under the authority of ships of war, the number of captures might be greatly increased : but such a consequence, however lucrative to individuals, never could be admitted as a sufficient justification of such a principle in point of political expedience. It is of much more important expedience that it should be left to the State alone to judge, both of the extent and of the mode of hostility that is to be exercised. That is a principle which must never be lost sight of. Looking at this case, therefore, in every point of view, both on principle and expediency, I have a clear and

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decided opinion, on which I feel no hesitation to pronounce, that this capture was not made by persons legally commissioned to take for their own benefit, and consequently, that the petition of Captain *Aylmer* must be rejected.

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THE NOSSA SENHORA DA ADJUDA, ARAUJO.

Treaty with
Portugal, 1654.
Free-ships, free-
goods:—Quære,
how far this
privilege can
be extended
to the carrying
of enemy's pro-
perty out of a
blockaded port.
—Restitution on
the facts of the
case, they being
not thought suf-
ficient to bring
the question of
law fairly before
the Court.

THIS was a case of a *Portuguese* ship, captured on a voyage from the port of *Rouen* to *Lisbon*, and proceeded against for a violation of the blockade of *Havre*.—It appeared that the vessel had gone in to *Havre* before the blockade (a) commenced, and had been taking in her lading from the 1st to the 29th of *September*.—She sailed from *Rouen* to *Havre* on the 1st of *October*, and proceeded on her voyage on the 19th, when she was captured by the ships cruizing off that port. The master, in his depositions, denied that he had received any information of the blockade before he left *Rouen*.—A claim was given for the ship as the property of merchants in *Portugal*; and for the cargo as privileged by the treaty of 1654, which established the exemption of free ships, free goods, between the two countries.

On the part of the Captors, the King's Advocate and Robinson contended—That the privilege of the treaty could not be extended to a case like the present; which included not only the carriage of *enemy's* goods,

(a) Blockade of *Havre*, Sept. 6.

but also the exportation of the goods of the enemy from a blockaded port.—As to neutral owners, it might be reasonable, that shipments on their account should be free from the penalty of breaking the blockade, till they themselves should be affected with a knowledge of the blockade, either *de facto*, or by construction of law; but with regard to enemy's goods, the blockade must be taken as operative from the moment of the notification, or from the time when it is actually imposed.

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JUDGMENT.

Sir *W. Scott*.—In this case the claim is given for the ship, and for some parts of the goods specifically, as belonging to the master; and for the rest of the cargo as being on board a free ship. On these latter goods it is assumed, that they are the property of the enemy; and then it is argued, that the protection of the treaty cannot be extended to the case of ships carrying the goods of the enemy *out of a blockaded port*. If the cargo had appeared to be actually the property of the enemy, it might have become necessary to decide that point of law, whether the privilege of *free ship, free goods*, can be construed to extend to the case of exporting enemies goods *from a blockaded port*, even before the ship herself is affected with a knowledge of the blockade. If such a case had fairly arisen, I should have taken some time to deliberate upon it. But, I perceive, the cargo, though claimed *generally*, is documented in the bills of lading as the property of merchants of *Portugal*, notwithstanding the master does not verify that fact in his depositions. Indeed, from the observations that we have frequent opportunities of making, it appears, I think, to be very much the practice of *Portuguese* merchants, to

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import on *their own account*. Since the utmost that I could do, in this stage of the cause, would be to order farther proof of the property; I am not disposed to do that, in a case like the present, for the purpose of raising the question of law. The whole cargo is described as *Portuguese* property in the papers, and as such I shall decree it to be restored.

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THE 'CARLOTTA, PASQUAL.

Salvage on neutral property, re-taken out of the hands of the enemy, not given. — unless it can be shewn by reference to the ordinances, or to the practice of the Prize Courts of the enemy, that the first seizure was made under such circumstances as would have exposed the goods to condemnation in the hands of the enemy.

THIS was a question of salvage, on the re-capture of a *Spanish* ship and cargo from a *French* cruiser. It appeared that the vessel was originally destined on a voyage from *Montevideo* to *London*, with some property on board belonging to *British* merchants; that in the course of this voyage, she had been seized by a *British* cruiser, who was bringing her to the port of *London*, when she was met and captured by a *French* privateer, and was afterwards re-captured, and brought to *Jersey*.

On the part of the *Spanish Claimants* it was contended—That neutral property was not, according to the ancient prize law of this country, subject to salvage; that the general principle was recognized, after deliberate search and inquiry into precedents, in the case of the *Jonge Lambert* (a). That the special considerations

Lords, 1745.

(a) As the *Jonge Lambert* is a case frequently cited on the question of salvage, it may not be improper to state the particular

siderations on which the alteration of practice took place last war, did not apply; and that there was no ground

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cular circumstances of it, from the books of Registry, and from a note of the case, with all its papers, in the possession of the Editor. It was a case of a *Dutch* ship, and a cargo of cotton, drugs, &c. taken on a voyage from *Smyrna* to *Amsterdam*, by a *French* privateer, and recaptured after three days possession, by the *English* privateer the *Salamander*, 6th *October* 1744. A claim was given for *Dutch* merchants, but the Judge of the Court of Admiralty thought it immaterial to go into proof of property, holding the cargo subject to condemnation, as property taken from the enemy, and pronounced sentence of condemnation 16th *November* 1744. This appears from the draft of the claimant's case of appeal, in which it is stated, "That the Court would not give time for that purpose, but went on the previous point, that as it was in possession of the *French*, it was just cause to condemn the ship and cargo. On appeal, the sentence was immediately reversed, the claim was admitted, and the parties were directed to go into proof, by the examinations, and other usual evidence. On the 25th *May* 1745, the Lords of Appeal decreed restitution of the property, but declined to enter into the consideration of the question of Salvage, and referred it to their Surrogates, Dr. *Bettsworth*, Dr. *Lee*, and Dr. *Edmunds*, by consent of parties, to determine "*whether any and what salvage is due*," on or before the first day of *Michaelmas* Term next, with provisions for the execution of their decree.

On the 8th *July*, the Surrogates met, and took upon them the reference, and directed the Proctor to exchange precedents, and leave copies in the Registry ten days before the 7th of *August*. On the 7th *August*, they met again, and directed the Registrar to look up the precedents delivered, by *Farrer*, Proctor for the captors, and appointed the 7th *October* for the next Sitting, and directed the Proctors to attend.—On the 2d *October* 1745, the Surrogates met, and having fully considered the whole matter, pronounced and declared *that no salvage is by law due on this behalf*, but that there was just cause of seizure, and that the parties appellant ought to be condemned in the expences due by law."

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ground on which the property of the *Spanish* merchant could be deemed subject to salvage.

JUDGMENT.

On this statement, it is not perfectly clear, what was the extent of their decision; whether it was meant to establish, that *no salvage is due* on the recapture of neutral property out of the hands of the enemy *generally*, or whether their decision was confined to that *particular case*, as the case of *Dutch* claimants standing on special grounds. The prayer of the claimants was restricted to the strong grounds of their particular case. "The claimants humbly apprehend, that they are well warranted to conclude, that the salvage insisted on by the captors, is contrary to justice, and to the rule, practice, and usage established between *England* and *Holland* in similar cases, and that the decreeing salvage would be acting contrary to the public faith and promise of the Crown, pledged to the *Dutch* in the most solemn manner before-mentioned, and be inconsistent with that probity and good faith, for which this nation has in all ages so deservedly distinguished itself—And therefore the claimants humbly hope their Lordships' said Surrogates will be of opinion, "That no salvage ought to be paid in the present case." The claimants case however contained two points—one on principle; and, secondly, this particular one standing on the peculiar relations of the two countries. On which of these grounds the Surrogates decided, is not expressly stated. The reference under the words of the Lords' decree, is not necessarily of a general nature; nor does the report of the Surrogates go beyond the particular case in all its circumstances.

Amongst those particular circumstances must be reckoned the reference which was made to the practice of the States of *Holland*, exemplified in two instances. In the case of the *Handmaid*, 1664, an *English* ship retaken from the *Algerines*; and in the case of the *Thomas and John*, 1676, an *English* ship retaken from the *French*. The *Handmaid* was restored, after some deliberation, and without reference to principle or precedent, but with an expressed reliance "that *Dutch* merchants, in similar cases, would receive the like treatment from *England*;" and in the case of the *Thomas and John*, the matter was referred, for an opportunity of applying to the Privy Council of *England* to obtain an assurance, that a like practice would be observed

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1664.

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1676.

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Sir *W. Scott*.—The question now to be decided is, whether salvage is due on the neutral property in this

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observed towards *Dutch* ships. This promise was given and communicated by Sir *W. Temple*, the *English* Ambassador at the *Hague*, and the restitution of the *Thomas* and *John*, without salvage, took place in consequence of that negotiation,

On the part of the captors, five precedents were adduced.—1st. The *Flying Dragon*, belonging to an *African* Company of *Embden*, 1697, recaptured from the *French* by an *English* man of war, and restored on salvage.—[Answered—That *Embden* was garrisoned as a *Dutch* place, and that *Holland* was at war with *France*.] 2d. The *St. John*, 1703, a *Danish* ship, with a *Hamburg* cargo, retaken from the *French*, and restored on salvage.—[Answered—That *Denmark* was involved in war with *France* as an ally of *England*, by declaration of *France* 3d July 1702, against *England* and her allies. As to *Hamburg*, that that city was a part of the *German* empire, and that the Emperor and the *Empire* declared war against *France* 28th September 1702.] 3d. The *St. Catharine*, taken 10th October 1703, restored to subjects of *Portugal* and *Hamburg*.—[Answered—That both were at war with *France*.] 4th. The *Old John Baptist*, August 1703. [Answered as above—a *Hamburg* case.] 5th. The *Wrestling Jacob*, a *Swedish* ship, restored 1696.—[Answered—That *Sweden* was engaged to furnish troops to *England* in her war with *France*, which began 1688, and did not end till 1697. That if *Sweden* was not actually at war with *France*, as might be suggested from *Sweden* being accepted as a mediator, there were reciprocal jealousies subsisting between the two Countries; that there had been a seizure of *Swedish* ships in *French* ports, and of *French* ships in the ports of *Sweden*.—It was contended therefore—That all the cases of the captors were cases of property exposed to danger in the Prize Court of *France*, and were, as such, inapplicable to a case of neutral property, which was not subject to the danger of condemnation in the Prize Court, of the first taker.

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this ship, which has been recaptured out of the possession of the enemy. It certainly has not been the practice of this Court to decree salvage under such circumstances generally ; but, in consequence of the violent conduct of *France* during the last war, it was thought not unreasonable, on the part of neutral merchants themselves, that salvage should be allowed. The conduct of the *French* nation, in the course of their warfare on land, during the present war, has unquestionably been as rapacious, and as little restrained by any regard to the rights of neutral nations, as it could possibly have been during any part of the last war. What the proceedings of the maritime Courts of that Country have been during the present war, I am not correctly informed ; from the little which I have been able to collect, I am rather induced to believe, that they have been conducted with more regularity, and with a disposition more inclined to return to the established principles of justice, on which the prize system of ancient *France*, in common with that of the other maritime countries of *Europe*, was built. I am therefore not disposed to hold generally, that neutral property recaptured from *French* cruizers shall

On this general objection to the effect of these five precedents, it may be observed, that on the first draft of the claimant's case, the same cases are referred to under the title of "Copies of some Cases of Ships restored to Neutral Nations," as authorities against the sentence of *condemnation* that had passed in the Court below — It appears that there were brought forward, in the course of the proceedings, some precedents of condemnation of neutral property taken out of the hands of the enemy — But on the other side they are said to have been either cases of contraband against the enemy — or of false papers — or of resistance to the enemy. — The *Queen of Heaven*, and other cases.

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be subject to salvage. The rule, so far as it can be considered a general rule, is rather to be laid down the other way. At the same time, if any edict can be appealed to, or any fact established, by which it can be shewn that the property would have been exposed to condemnation in the Courts of *France*, I shall hold that to be sufficient ground to induce me to pronounce for salvage in that particular case. With regard to the precedent of the *Jonge Lambert*, I think I am warranted to consider the authority of that case as in great measure done away by the subsequent decision of the Lords in the late war, in which they have repeatedly pronounced for salvage on the recapture of neutral property. In departing from the old rule, they have in some degree disclaimed the principle; and, I think, with great propriety, as far as it could be considered as an universal principle, governing the practice of our Prize Courts in all possible cases, without any possible exception. In the present instance, there does not appear to me, to be any grounds on which it can be supposed that this property would have been condemned, merely because it came out of the hands of a *British* privateer, or because the original voyage had been from the colony of *Spain* to *London*. No edict has been produced from the *French* code, to shew that this property would have been subject to any such penalty, on either of those accounts, in the Prize Courts of *France*. The expences of the recaptors must be fully paid; but I shall not pronounce salvage to be due.

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THE DIANA, RUNKE.

Claims of persons settling in the *Dutch* colonies, whilst in *British* possession, and resident there at the breaking out of the war, for property seized before hostilities.

The onus probandi as to an intention of removing, received by the particular circumstances of the colonies having been in *British* possession, till after the termination of the last war, taken in conjunction with the presumption raised by the stipulation of the treaty of *Amiens*, that persons so settled, would remove, on the restitution of the colonies to *Holland*.

THIS was a leading case on the claims of several persons who had settled in the *Dutch* colonies, in the course of the late war, during the time they were in *British* possession, for property taken before hostilities, on a voyage from the *Dutch* colonies to *Holland*.

JUDGMENT.

Sir *W. Scott*.—This question concerns the manner in which the goods of two classes of persons connected with *Demarara* are to be considered. The two descriptions of persons are, those who had settled in *Demarara* during the time the island was in *British* possession, and those who had settled there before that event. It was first contended on the part of those settling there, whilst the island was under *British* protection, that their settlement had been very recent. That alone would not be sufficient. Mere recency of establishment would not avail, if the intention of making a permanent residence there was fully fixed upon the party. The case of Mr. *Whitehill* fully established this point. He had arrived at *St. Eustatius*, only a day or two before Admiral *Rodney* and the *British* forces made their appearance; but it was proved, that he had gone to establish himself there, and his property was condemned; mere recency, therefore, would not be sufficient. But it is said that this was not merely an establishment recently formed, but one formed also whilst the island was under the protection of the *British* Government. This indeed may afford a very material addition to the circumstance of mere recent establishment. What the effect might be,

be, it may be unnecessary for me to enquire, till it shall appear whether there was any compact between the countries, which in any manner determines what the character of persons in that situation should be; because if there is any such agreement, it will be needless for me to make an excursion into general principles, when the point in question will at last be governed by the particular stipulations of the compact. The Treaty of *Amiens* contains an article, which, it is said, does point to the character of such persons. The 13th article stipulates, that, in cases of cession, "*there shall be allowed to the inhabitants, of whatever condition or nation they be, a term of three years, to be computed from the notification of this present Treaty, for the purpose of disposing of their property acquired and possessed either before or during the war, in which term of three years they may have the free exercise of their religion and enjoyment of their property. The same privilege is granted, in the countries restored, to all those, whether inhabitants or others, who shall have made therein any establishments whatever, during the time when those countries were in the possession of Great Britain.*" Certainly the intent of this article must be considered as a stipulation, between the two Countries, for *this purpose principally*, that the country to which the cession is made, should not molest the inhabitants so restored, but that a space of three years, from the notification of the Treaty, should be allowed for the unmolested removal of themselves and their property. Primarily, therefore, it is not intended as a contract with those individuals that, under all circumstances that may happen between the two Countries, they shall be held *British* subjects by the Crown of *Great Britain*. At the
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same time, I cannot but think that it affords a principle highly material and favourable to the claimants, in the presumption which it holds out, that those who went there during the time of *British* possession, had done so *on account of British possession*, and might be supposed to be desirous of quitting those establishments, when the island ceased to be under the protection and government of this Country. It goes, therefore, to the point on which a great deal of the discussion turns, the *onus probandi* on this question—whether or not it lies on the claimants to shew, that they had taken measures to withdraw, and had actually engaged in the operation of removing. The Treaty shews it to have been the expectation of the contracting parties, that they would remove.—A presumption is therefore founded in their favour, not only on the general nature of the facts, but also on the declared opinion of the Countries that were parties to this Treaty. In this state of things, it is *not*, I think, necessary for the claimants to produce that evidence which has been demanded, to shew that they had taken any steps towards removal; because the presumption is to be taken as already in their favour, unless it is ousted by the production of any contrary evidence on the other side. It is contended that there is something to that effect in the time which had already elapsed; and that the inaction of the parties, during that period, affords a counter-presumption that they were not in the act of removing, and that they did not intend to remove. In support of this argument, it is said, that the parties might be expected to *determine* at an early period, and that the three years were allowed only for carrying the removal into effect.

It

It is argued, that the determination should have been made at an *early period*, though no specific time has been assigned. In answer to these observations, it is, I think, to be conceded that the determination could not be expected to be *instant*. Some reasonable time for deliberation must be allowed. The time given by the Treaty is *three years*, and not from the date, but from the notification of the Treaty. If it could be maintained, that persons were obliged to come to their determination in the first or second year, there would be still the third year for their actual removal; and there are two or three circumstances of a public nature, that may, in fair consideration, be supposed to have enlarged to these persons the term of the Treaty. In the first place, it is to be observed, that of the three years a very small portion had elapsed before the war broke out; indeed the term is not yet expired. Secondly, the cession of the colonies was not made immediately after the Treaty; it was a matter which hung for a considerable time in suspense. Owing to a want of ships and troops, or from other causes, the *Dutch* did not take possession for many months, and the island remained *de facto* in the possession of this Country. During this period their term for deliberation was necessarily protracted. It must not be withdrawn from our recollection also, that during the short interval that Peace half smiled upon us, circumstances of irritation were continually occurring, which might fairly induce persons in that part of the world to speculate upon the chance of those settlements falling again under the dominion of *Great Britain*. Under such considerations we may suppose that their removal would be retarded; the hope that

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Great Britain would return to its sovereignty over this settlement might naturally suspend the resolution to remove. Within a very short time after the notification, the events, that might have been expected, actually took place. Hostilities recommenced, and on the first application these persons surrendered again to the *British* arms, and became not only in their property, but *territorially*, as much the subjects of this country as the inhabitants of any part of it. When I bring these topics together, I do not mean to make a collection of events which have no material connection with each other, or to form an aggregate of unsocial materials, the effect of which singly taken would not be sufficient to support the conclusion that is drawn from them. That, I know, is a very unsound and fallacious mode of reasoning; but I collect circumstances of a concurrent bearing, and of a congenial quality, all of which taken separately are entitled to great consideration, and conjointly contribute to increase the force of each other. With respect therefore to those who settled there, during *British* possession, I am of opinion that the presumption of an intention to remove was established in their favour; that, under the appearances which the known circumstances of the world held out, they had a right to spend some time in deliberation, and that that term could not be held to be expired when hostilities again broke out. The goods in question were shipped in a time of Peace, and under the faith of a Treaty; and at the time when this Court is called upon to decide on the claim, the proprietors are again restored to their *British* character, and are *redintegrated* subjects of this country. Under all these circumstances I should betray a very
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obtuse sense of what is absurd and unjust, if I did not feel it highly reasonable that they should be admitted to their Jus Postliminii, and be held entitled to the protection of *British* subjects. The cases which have been cited do not, I think, substantially apply to the present case. Mr. *Whitehill* went not to an *English* settlement, but to a place which had, as it has been observed in argument, rendered itself particularly obnoxious by its conduct in that war. On the authority of Mr. *Curtis*'s case, it is contended, that some act of removal was necessary to be *shewn*; but that Gentleman had settled not in a *British* colony, but in a foreign country, which made him justly liable to be called upon to shew by some overt act, that he had begun to remove. The claimants on the contrary had established themselves, as I have before said, in a *British* settlement, under a presumption publicly recognized, that they would remove when the connection with the *British* Government ceased. Their time for deliberation was still unexpired, and on their claim I pronounce without hesitation that they are entitled to restitution. As to other persons who had formed their establishment before the period of *British* possession, I cannot see on what principle the same intention can be sustained. As they had settled without any faith in *British* possession, it cannot be supposed that they would have relinquished their residence because that possession had ceased. They had passed from one sovereignty to another with indifference; and if they may be supposed to have looked again to a connection with this country, they must have viewed it as a circumstance that was in no degree likely to affect their intention of continuing there. They are, there-

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fore, entirely out of the principle which I have laid down in deciding on the other claims; and unless I could go to the length of considering, that because the Treaty had not been executed in some parts, the whole was therefore null, and this settlement *de jure* never out of the possession of *Great Britain*, as it has indeed been contended in argument, I see no ground on which their claim to restitution can be sustained. It is impossible for me to entertain any such construction. The Treaty consists of several articles, of which some were to be carried into immediate execution, whilst others were merely executory. But so far as the Treaty *was* carried into execution, so far I must consider Peace as actually subsisting between the two countries, notwithstanding war may have broken out again, on some of those other articles which were in their nature executory, and were originally subject to some delay. The Peace must be held to have been perfectly re-established in all legal effect, and I have heard of no case in which this matter has been otherwise considered in other Courts of Justice. On the situation of persons settled there previous to the time of *British* possession, I feel myself obliged to pronounce, that they must be considered in the same light as persons resident in *Amsterdam*. It must be understood, however, that if there were among these any who have been actually removing, and that fact is properly ascertained, their goods may be capable of restitution. All that I mean to express is, that there must be evidence of intention to remove, on the part of those who settled prior to *British* possession, the presumption not being in their favor. What I have said of *British* subjects settling during the time of *British* possession, must

must be taken also as applying equally to the claims of all persons of other countries going thither, and forming their establishment there during that period.

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IN THE SAME CASE.

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A QUESTION arose, respecting the liability of goods restored to *British* merchants, in *Dutch* ships captured on a voyage from the colonies of *Holland* to *Amsterdam*, and condemned to pay freight to the captors.

Freight allowed to captors carrying the goods not to the actual port of destination, but to the claimant's own country, and to the ports to which they would have consigned them if not prevented by the regulations of Holland. See the particular circumstances.

On the part of the Captors, the King's Advocate, Arnold, and Robinson.—By the general rules of the Prize-Courts, captors have no claim on the cargo for freight, unless it is carried by them to the place of its original destination; and for this reason, that the goods cannot be supposed to have derived any benefit from the capture, but are still left in the owner's hands, to be sent on by a new shipment to the place of their destination. A distinction may, however, be taken, in respect to the nature of the destination. The original rule was undoubtedly framed with a view to *European* commerce, in which the profit of the whole adventure may depend upon the particular order given for the goods, and on their arrival at the particular place; whilst from the similarity of *European* productions, they might be of little value, even at a small distance from the particular market for which they were designed. With respect to colonial productions the case is very different; they may be said to have a double distinction. First, To the *European* market generally,

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by which their principal value is constituted; and, secondly, To the particular market to which they were consigned. The first increase of value has accrued on these goods, by their safe arrival at the *European* market generally. But a more special advantage has been derived to these claimants, from having actually received their property in their own country, instead of suffering the risk of confiscation, if the goods had gone in their original course to the ports of the enemy. It is besides to be remembered, that in the special application which was made on behalf of *British* merchants, *that they might be allowed to claim goods so entirely incorporated into the colonial trade of the enemy, the destination to Holland* was represented as a circuitous and compulsive destination, to which they submitted, only, because they had no means of bringing their goods home from the *Dutch* colonies, in any other than *Dutch* ships. By their arrival in this country, they have therefore obtained a delivery at their own home, in the ports for which their goods were virtually designed. These cases stand on special grounds therefore, and may justly entitle the captors to freight, without breaking in upon the rule, which is laid down for cases under ordinary circumstances.

On the other side, Laurence and Swaby.—If the principle of the general rule is considered, it will appear, that there is no distinction in the circumstances of these cases, that can fairly be applied to defeat the application of it. The principal is, that when the *Original* contract has been fulfilled, the payment of freight is due, and not otherwise. It is not upon an ideal estimate of benefit, or disadvantage, that this principle

principle of law is founded; but on the precise consideration of the original contract, whether it has been performed or not. The distinction which has been attempted, with regard to colonial productions, is totally untenable, inasmuch as the rule has been applied to destinations from the *East Indies*, as well as from ports in *Europe*. The case of the *Etrusco*, was a case of this nature: Mr. *Constant* came from the *East*, and being captured on board that ship, settled in this country as a merchant, and obtained restitution; yet, on consideration that the original voyage, which was to *Ostend*, was not performed, the Lords of Appeal did not think proper to depart from the general rule, but rejected the demand for freight.—If the question depended in any degree on the estimate of advantage or loss, it might be shewn that the claimants have suffered a considerable inconvenience, by the delay that has been occasioned in bringing these goods to market, by the expence of obtaining restitution, and by the disadvantage of selling at last in a glutted market, instead of the markets on the *Continent*, to which the goods must now be sent on an ulterior destination.

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In reply, it was answered,—Mr. *Constant* was a native of *Switzerland*, who was returning to that country, and claimed in a *Switz* character. The original destination of himself and his property, was to *Switzerland*; but when he was brought in, and detained a considerable time, in prosecuting his claims, the public events that took place in his own country, as well as other private connections which he formed in *England*, over-ruled his first purpose, and induced him

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him to settle here. The goods were claimed; and restored as *Swiss* property, destined to *Ostend*; and therefore, the *original contract*, and the purpose of the shipper, not being fulfilled, the old rule fairly applied. Here the special consideration is, that the claimants receive their goods in their own country, and, according to their own petition, in the very port to which they would have consigned them, if they had not been compelled to seek a destination to *Holland*, for want of a direct conveyance to this country.

JUDGMENT.

Sir *W. Scott*.—This is a question of freight, in which I have to determine whether these cargoes, taken before hostilities, and brought into this country, should pay freight, having been destined to another country, under the original contract. Something has been thrown out in argument, as if the Case of the *British* Proprietors was to be more favourably considered, because, this being a seizure prior to hostilities, the Prize Interest vests not in the immediate captor, but in the Crown, and because the captors may expect to receive ample remuneration from the bounty of the Crown. Whether the condemnation of these ships passes to the Crown, or to the captors, can certainly make no difference. The claimants will have the same right against the private captor, as against the Crown, and no more. They will have a right to restitution of their property, under the relief which has been afforded to them by the special instructions of the Crown. Whether the *freight* is to be considered as a part of their property is the question

question now to be determined. If *that* has accrued by right of war to another, *it is not their property* under these instructions, neither are they at liberty to argue on any conjecture, as to what the liberality of the Crown may give to the individual captors; whether the whole, or what proportion, is a matter with which they have no concern.

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There are two rules on this subject equally general : The first is, that if goods are not carried to their original destination, within the intention of the contracting parties, freight *shall not* be due; and on this ground, that the contract not being completed, either in substance or form, the speculation of the party has not been productive. The benefit of the contract is lost, and the party has to provide another vehicle, to carry on the goods to the port of their destination. In some cases, indeed, it may happen that the port to which the goods are brought, may prove more beneficial, and afford a better market. But the Court does not enter into the minutiae of such calculations, which would be attended with great trouble in the inquiry, and much uncertainty in the result. It takes the presumption arising from destination only, and founds upon it the general rule, that, in such a case, the claimant *shall* receive restitution of his goods without the burthen of freight. The other rule equally general, is, that when *the contract is* executed, by bringing the cargo to the place of destination, the captor, to whom the vessel is condemned, *shall* be entitled to the freight which has been earned. He stands in the place of the owner of the ship, and is held entitled to the price of the services which have been performed in the execution of the contract. In some instances it may prove *disad-*

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vantageous to the claimant ; and it is certainly a clear inconvenience in all cases to be obliged to receive the goods under the process of a Prize Court, subject to the expences which may have been incurred, or to the delay of further proof, instead of taking them with more facility in the course of their original consignment. But on the same principle the Court declines, on this side also, to enter into a minute estimate of these circumstances, which must in every case branch out into particulars of infinite variety. It constructs a general rule on the same grounds of presumption, which it assumes on the other side, and decrees freight to be paid to the captor, in the same manner as if the goods had been delivered under the original consignment. These are two classes of cases, and the question is, under which class the present case falls, or whether it may not form a third and distinct class, founded on peculiar circumstances, and requiring a rule not strictly applicable on the same precise ground to either of the other two. What are the facts? The claims were given by persons of this country, on a representation, that these goods were going on a destination which was obtruded on them by the narrow policy of *Holland*; that having themselves elected this country, as the most eligible country for importation, they were compelled to send their goods to *Holland*, though with the final intention, on their own parts, to have these goods remitted either in specie or in proceeds to this country, as the country to which they would immediately have consigned them, if at liberty so to do. Now I cannot but think, that this fact forms a material fundamental basis for the rule which is proper to be applied to such cases ; for although the voyage has

not been precisely that described in the contract, it is *that*, which the parties themselves would have elected, if not prevented and diverted by the over-ruling policy of the foreign country. As to what is said of the disadvantages which the claimants may have sustained, the Court enters not into such considerations, and for the reasons described. It is not in the habit of doing it, in cases falling under either of the general rules which I have mentioned. Indeed, the parties are in a great measure stopped from averring, that the arrival in this country is not beneficial to them, by having framed their application on a previous averment of their wish and final determination to have brought the produce hither, if they had not been restrained. They must be presumed to have formed this determination, on a view of all the advantages and disadvantages that were likely to proceed from it. At the same time, though I will not enter minutely into the question, I cannot but observe, that they have received restitution in their own ports under their own eye, and where the delivery has been in *London*, in a port which has been the great depot of articles of this kind for some years, and may be supposed therefore to be a port eminently beneficial. As to what is said of the delay or expence of obtaining possession through litigation, those inconveniences are not more than may be imputed to other cases, falling under the old rules. Once for all, on that subject, it cannot be expected that the merchant in time of war should obtain possession of his goods seized, with exactly the same convenience, as he would have done, under the original consignment in time of peace, and when none of the accidents of war had intervened to interrupt the delivery.

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Looking at the substance of the case, and seeing that the parties have obtained restitution in their own country, and generally in the very port which they would have elected, if they had not been diverted by overruling necessity, I think it may be considered as coming under the second rule, or, if not under that, under another resting on nearly the same principles. The case of the *Etrusco*, which has been cited, was a case of a ship that had come from the *East-Indies*, almost to the port of her destination, which was *Ostend*. The claimant was a *Swiss* gentleman, who was brought hither solely in consequence of the capture, and who was *afterwards* induced to settle in this country by circumstances of a private and domestic nature. That case therefore bears no real resemblance to this. It would have been precisely a parallel case, if by any physical possibility, the ship and goods could have gone to *Switzerland*; or if the parties could and would have sent them there, if not obstructed by the authority of a hostile power. If either of these cases could have happened, will any body say that freight would not have been decreed? In that particular case, the Court of Appeal would not enter into the subsequent history of the claimant, though it is impossible not to remember that a good deal of commiseration mixed itself with the considerations on which that judgment was formed. On the reasons which I have stated, applying only to the circumstances of this class of cases, and not to be made a ground of experiment for similar demands, in other cases not attended with the same original facts, on which this case is to be decided—not because the result in coming to these ports may have been more beneficial to the parties, but because

cause the intention of the parties, as they have themselves stated it, has been substantially fulfilled, and the goods have been delivered to their possession in the very country (*a*) to which they would have wished them to have come, I pronounce these to be cases in which freight is due.

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THE FREYA, JØRDT.

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THIS was the case of a demand for damages on the part of a *Danish* vessel captured on a voyage from *Cette* to *Amsterdam*, and brought to *Dover*. On arrival at *Dover*, it became necessary that the ship should perform quarantine before she could be admitted into the harbour. The place assigned for this purpose proved unfit for a vessel of her form, and it appeared that the master had represented the structure of his vessel as requiring a particular birth, and had received a promise that she should be laid in flat water.

Damage sustained during quarantine, owing to the unsuitable nature of the place assigned for quarantine, repaired by Government.

On these facts the Court said—That no blame attached to the captors in this case; but since it had happened to a neutral vessel, brought in by force, that an unsuitable place for quarantine had been assigned, and that the vessel had received considerable injury from that

(*a*) On the claims restored to foreign merchants, no freight was paid—*Hoep*, June 15th. In the case of the *Vrouw Henrietta*, 23d March, on the claim of Mr. *Ancrum*, a merchant of London, a distinction was taken that the goods were not brought to London, but were unlivered at *Plymouth*, and therefore that they had not been brought to the claimant's own port.—The Court overruled the distinction, and held that parcel of goods to be equally subject to freight.

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circumstance, it seemed but proper that the matter should be represented to Government as a damage fit to be redressed from that quarter; since it had happened under the management of the public officers of the port, though without any misconduct imputable to them.

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Blockade of the
Elbe.—Directions of the
owner, respecting
the probable
continuance of
the blockade,
will not justify
a ship in coming
to the mouth of
the blockaded
port for enquiry.

THE SPES, CORNELIS, AND THE IRENE, LUBBEN.

THIS was a case of two vessels proceeded against and condemned for a violation of the blockade of the *Elbe* (a).

On the part of the Captors, the King's Advocate stated—That it appeared in evidence that the owner of the vessels was conscious of the blockade; but that he nevertheless wrote to the master, informing him of it, and directing him to continue his course till he was warned, and turned away. That the vessel sailed accordingly for the *Elbe*, and was captured, in the attempt to enter that river, by one of the blockading frigates.

On the other side, Laurence.—The blockade, under which these proceedings arise, is of a very peculiar nature, being imposed not against the trade of *Hamburg*, but upon the mouth of the river *Elbe*, owing to the possession which the enemy had taken of the adjacent country. The novelty of such an event, and the peculiarity of its nature, may justly entitle the parties to an interpretation of *their conduct, very different from what might attach upon them, if the case*

(a) The notification of the blockade of the *Elbe* appeared in the Gazette, 28th June, 1803. *Wefer*, 26th July. *Havre*, 6th Sept. had

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had arisen on the violation of a blockade imposed on the ports of the enemy. In such a case the neutral merchant would have no excuse for engaging in premature and unauthorized speculations, on the termination of such a blockade; but in the present case, a blockade against the enemy in the interior, might be presumed not to be co-extensive in its consequences, and equally permanent with a blockade imposed on the enemy's own ports. It might be expected to be of short duration, and such was the general opinion at the time. Notice had been given in June. The vessel did not sail from *Archangel* till November. In the intermediate time, and at that distance, there was ample room to suppose, that the blockade had been removed; and intelligence to this effect was given to the master by the *Hamburgh* Consul at *Archangel*, and transmitted also from his owners at *Hamburgh*; in such an uncertain state of things, the contingent orders given to the master, were nothing more than have already been allowed to *American* vessels, sailing under an ignorance of what may be the state of public affairs in *Europe*. The orders to go to *Norway*, on the first intimation of the continuance of the blockade, must be taken also, as part of the instructions—and if obeyed, as it appears they were by the declaration of the master, who, at the time of the seizure, said he was going to *Norway*, they would have the effect of removing all actual, as well as all intentional offence, and entitle the parties to the benefit of a deviation.

JUDGMENT.

Sir *W. Scott*.—These cases stand upon one ground, being the cases of ships belonging to the same owner,
going

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going from *Archangel*, with an avowed purpose of entering the *Elbe*. The master of the *Irene* had, as it appears, received a letter from his owner, giving notice of the blockade, but expressing an opinion, that it would not be of long continuance. Under this expectation he was directed to proceed on his intended destination, to come off the *Elbe*, and to enquire whether the river was then under blockade or not. It has been contended, that the blockade of the *Elbe* is to be considered on different principles from those that are applied to other blockades, inasmuch as it is a blockade not imposed upon the *country*, but on the enemy in the interior ; that it was directed principally against the enemy ; and that it is only incidentally, and by unavoidable consequence, that the trade of the neutral neighbourhood is made subject to it. This representation is to a great extent true, and may, under circumstances that admit of any latitude of interpretation, entitle the parties to all the indulgent considerations that can fairly be applied to their case.—But all the general consequences of such a blockade must be supposed to have been duly considered by the Government imposing it ; and when the measure is once applied, the Court is under the necessity of enforcing it, on the only principles, on which any other blockade ever has been, or can be established. Were the Court disposed to desert those principles, and to wander into new speculations respecting blockades, I do not observe, that the gentlemen have even suggested the new principles on which it could act. The Court is therefore under the necessity of applying the same general principles, on which all former decisions on this right of war have been

founded; though in so doing, it would be disposed, undoubtedly, to apply them leniently, and with attention to every circumstance that could entitle the parties to favourable considerations. Then what are the facts? These ships had both received notice from the owner, that the *Elbe* was, at that time, in a state of blockade. It has been said, that no such intelligence had been received from the *Consul of the State of Hamburg*; though I must presume it had, because as the notification was made to the Consul here, it was his duty to make the communication to the Consuls of his Government in foreign ports. And as the information had arrived at *Hamburg*, and had been actually communicated from thence to *Archangel*, by private channels, the same communication must be supposed to have been made from public authority to the public Minister; or, if not, if there had been any neglect, the consequence must be imputed only to the State, and its officers, who are answerable to their subjects for the consequence of their neglect. It is said indeed, that the masters received contrary information from their Consul, and that they were told by him that the blockade was raised; though the averment does not, I perceive, distinctly state that, as appears by the evidence in this very case, but only that it would be raised before they arrived. Had the information been more positive, it would be difficult to attribute to it any such effect as would serve to the indemnification of these parties. If this conjectural information at *Archangel* proved false, they must look for redress to their own Government, or to those employed under it, who gave such erroneous intelligence. If the information of
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foreign ministers could be deemed sufficient to exempt a party from all penalty, there would be no end of such excuses. Courts of Justice are compelled, I think, to hold as a principle of necessary caution, that the misinformation of a foreign minister cannot be received, as a justification for failing in actual breach of an existing blockade. The letters of the owner inform the masters that the blockade would probably be at an end before they arrived, and direct them to proceed for the *Elbe*. Are these the orders which owners ought have to given? I think not. The neutral merchant is not to speculate on the greater or less probability of the termination of a blockade, to send his vessels to the very mouth of the river, and say, if you do not meet with the blockading force, enter—if you do, ask a warning, and proceed elsewhere. Who does not at once perceive the frauds to which such a rule would be introductory: The true rule is, that after the knowledge of an existing blockade, you are not to go to the very station of blockade under pretence of enquiry. It is contended, however, on this point, that the parties are entitled to the same equity as was allowed to *American* vessels during the last war. But what was that? That ships sailing from *America*, before the knowledge of the blockade had reached *America*, should be entitled to a notice, even at the blockaded port; and that ships sailing afterwards, might sail on a contingent destination even to that port, with the purpose of calling at some *British* port, or at some neutral port for information; and that they should be allowed the benefit of such a contingent destination to be ascertained and rendered definite, by the information which

which they should receive in *Europe*. But in no case was it held that they might sail to the mouth of a blockaded port to enquire whether a blockade, of which they had received previous formal notice, was still in existence or not. If particular parties are innocent in their intention, it is still a measure of necessary caution, and of preventive legal policy, to hold the rule general against the liberty of enquiring at the very mouth of the blockaded port, which would amount in practice to a universal license to attempt to enter, and, on being prevented, to claim the liberty of going elsewhere. It is next contended, that the master on being brought to sail, that he was not going to a blockaded port, but that he would go, in obedience to his instructions, to a port in *Norway*, and therefore that the claimant is entitled to the benefit of a deviation. But this comes too late; he was taken in the act of going towards the blockaded port. The act is, in my opinion, to be taken as completed by the attempt. If the owners are innocent, they must, in law, be bound by the indiscretion of their agent. But this is not a case of persons suffering merely by the misconduct of their agents. The owners here are directly implicated by the instructions which they themselves have given. It may fall hardly upon them, but I feel myself obliged to pronounce, that there would be no principle, upon which a blockade could be enforced, if such excuses as these were to be admitted; and that these vessels are subject to condemnation.

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THE TWILLING RIGET, METZ (a).

Freight, at what rate chargeable, on captors, for a cargo condemned? not necessarily to be taken at the chartered price, as raised by considerations of danger, and difficulties, arising out of the war.

THIS was a case on objection to the Registrar's Report, respecting the amount of freight, that was to be paid to this vessel and several other ships, under a Decree of Restitution *with freight*. They were ships that had been captured on a voyage from *Batavia* to *Copenhagen*, under an affreightment to Mr. *De Coninck*, and employed in transporting to *Europe* the quantity of *Batavian* produce which that gentleman had purchased under contract with the *Dutch East-India Company*.—*Vide* Adm. Reports, Vol. 4. page 121.

The Act of Court set forth, on the part of the owners, that the ship had been chartered at *Copenhagen*, in *June 1798*, to perform a voyage to *Batavia* in ballast, and back to *Copenhagen*, with a cargo, at the freight of 60,000 dollars, being equal to about 120 rix dollars per ton. In the report, the Registrar and merchants were disposed to consider this freight as above the just rate, and allowed only what other ships appeared to have contracted for, about the same time, 95 dollars *per ton*. The freight was calculated at that rate, on *the burthen of 365 tons*, whereas it was stated as a material objection, that the tonnage in the *East-India* trade is not confined to the ship-builders measurement, but that there is an option allowed, of taking either that measurement, or another known rule, according to the proportionate bulk and weight of certain articles.

(a) Late war.

On

On this point, Laurence and Robinson.—The principle of allowing to neutral ships their freight must necessarily be taken with reference to the actual af-freightment under which they were employed, unless that contract can be impeached as *fraudulent*, or as so extravagant as to be utterly irreconcilable with the general course of commerce at that time. In this case, it is not attempted to impeach the terms on any such grounds. A third part of the price has actually been paid; and it is certified by Mr. *De Coninck*, who has no interest in this question, that the terms were the lowest terms, which he was at that time able to procure. It is however said, that, in the *September* preceding, he had chartered two other ships, at the rate of 95 dollars *per ton*; and because those cases happened to come to the knowledge of the Registrar and the merchants, that price is taken as the basis of the calculation, although it is notorious that nothing in trade is liable to greater fluctuation than the price of freight, according to the demand for shipping, and a thousand other circumstances that may affect the market. A second material objection to the report is, that the Registrar and merchants have taken the tonnage at the ship-builder's admeasurement only, without reference to the mode on which freight is calculated in the *East-India* trade, by which this ship did actually carry 504 tons. For instance, it appears to be the course of this trade in *Denmark*, that, when ships are chartered by the ton, an option of estimating the freight is always allowed to the master to take it either at 2000lbs. weight, or at 37 cubic feet,—that some articles, such as sugar, tin, and wood, are usually charged by weight, whilst other articles are usually

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reckoned by cubic feet measurement, and the result is according to Mr. *De Coninck's* affidavit, that coffee and pepper make about 1380, or 1385lb. *per* ton, but never so high as 1400—that of cotton yarn 37 cubic feet weigh only 800lb.—that this article cannot be reckoned at more than 800lb.—and that other goods, as well spices as indigo and camphire, produced about 1000lb. *per* ton. The Court asked, whether the report had been framed with any reference to this mode of calculation, and on being informed that it had not, directed the report to be reconsidered under the observations, which were fully stated in an affidavit of Mr. *De Coninck*.

On the other point, the King's Advocate contended—That the Registrar and merchants were by no means bound to adhere to the charter-party in the allowance of freight; even when no imputation of fraud or improvident extravagance could be fixed upon it; that when the price of freight was much enhanced by the difficulties and perils of war, or by a mode of navigation arising out of particular speculations of interest, ships engaging in such hazardous or peculiar trade, were not at liberty to charge to the captors the rate of freight which they might, under very honest intentions, have contracted to receive from the owner of the cargo. That this was decided in the case of the corn ships, in the beginning of the last war, and in the provision-ships from *America*, which had contracted for a profit of near 80 per cent. owing to the distress of *France*, but yet no more than a reasonable profit was allowed. That the course of trade in which the ships were engaged, in the present case,

case, was as little entitled to be favourably considered as any could be, since they had been engaged in a course of trade wholly unknown to them before, to convey to *Europe* the produce of the *Dutch* settlements of *Batavia*, sold under a contract which the Court had already pronounced to be illegal.

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Sir *W. Scott*.—It is agreed on all sides, that these cases must go again before the Registrar and merchants, to be reconsidered, on the objections that are made to the mode of calculating the burthen. It will, therefore, not be necessary for me to say much on that point, or to give any precise judgment upon the case at large; because if it should happen that they see occasion to make a larger allowance on that score, it is probable that the difference between the parties may no longer be very material. At the same time I will say, that I perfectly accede to the principle that has been advanced, in support of the rule, on which the Registrar and merchant have proceeded, that the *charter-party is not the measure* by which the captor in all cases is bound, even where no fraud is imputed to the contract itself. When by the events of war, navigation is rendered so hazardous as to raise the price of freight to an extraordinary height, captors are not necessarily bound to that inflated rate of freight. When no such circumstance exists, when a ship is carrying on an ordinary trade, the charter-party is undoubtedly the rule of valuation, unless impeached; the captor puts himself in the place of the owner of the cargo, and takes with that specific lien upon it. But a very different rule is to be applied,

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plied, when the trade is subjected to extraordinary risk and hazard, from its connection with the events of war, and the redoubled activity and success of the belligerent cruisers. It appears to me, that this is a case of that kind; and it may not be improper to advert a little to the nature of the commerce in which this ship was engaged, in the performance of a contract, which has been deemed illegal, both in this Court, and in the Court of Appeal. In such a service, it could not but have been considered as an adventure of some hazard, to send ships on a new and experimental trade, which was, in its effect, to put Mr. *De Coninck* into the place of the *Dutch East-India* Company. The Owners would naturally look for their indemnification in an advanced freight, in terms, which might not be in any degree unfair, or unreasonable between the parties, considered as the premiums of a voyage eminently hazardous on account of its illegality, as against the rights of this country. Mr. *De Coninck* also might look for *his indemnification* to the *Dutch East-India* Company, in the price, at which he had obtained this contract, in consequence of their distress. Considerations of this nature might render it a *real* and fair contract between the parties; but the freight, as a burthen upon the *English* captor, does not come loaded with all these considerations, none of which apply to him. The cases of the corn ships do, I think, bear a fair analogy to this case. I remember well, that in those cases, a paper was thrown on this table, stating the price not to be unreasonable, under the opinion of some of the most respectable merchants of this town, that such would be the price

price paid by the *French* consignee under the then distressed state of the *French* market. But the Court said, that they *mistook the principle*, and were deciding a question of law—viz. that the captor was in all cases bound to stand to the chartered price, if not impeached by the real prices of the market. The principle of that decision is not, in my opinion, improperly pressed into the present case; and it does sufficiently confirm the general position, that captors are not in all cases bound by the terms of the charter-party, though they may not be colourable, or liable to any imputation of fraud. At the same time, the Registrar and Merchants will not depart from the charter-party without good cause, and without looking on all sides for information. Something has been thrown out, in argument, as if they had looked no farther than to the two particular cases, in which a freight of ninety-five dollars *per ton* has appeared to have been the freight stipulated for a similar voyage in *Copenhagen*, about the same time. I cannot suppose that to be the case: On the contrary, knowing their experience in matters of trade, their opportunities of information, and the strict sense which they entertain of their duty to the Court, and to the public, I am to suppose, that they look abroad on all sides, to obtain all possible information that may enable them to do justice between the parties. I consider their report not as an opinion, formed only with a reference to those two cases of Mr. *De Coninck*, but as the result of deliberate enquiries, by which they were led to consider this allowance as an adequate freight for such a voyage, under all the circumstances that were fairly applicable to it. Affirm-

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ing the general principle, I shall refer the report back for their reconsideration (a).

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1804.

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1804.

THE INDUSTRIE, ROLFF (b).

Expences of unlivery and appraisement, how marshalled under the circumstances of this case.

THIS was a question respecting the expences of unlivery and warehousing, viz. on whom they should fall.

King's Advocate.—In this case there has been a necessity for farther proof to obtain restitution of the cargo, which fully justifies the seizure, and made it necessary that the cargo should be unlivered, and lodged in warehouses. The expences incurred on this account can fall therefore no where but on the property—that is, on the claimant, if he obtains restitution,—on the captor, if the cargo is eventually condemned. Such has been the practice in numberless in-

(a) In the amended report, the Registrar and Merchants formed their computation according to the tariff of the *East India* Company, for the regulation of freights in *India*; and allowed a farther sum. On this mode of calculation, also a farther objection was taken in the *Kron Prinz*, that it did not afford an adequate profit, not even an indemnification for the out-fit, and other risks on such a voyage.—That the mode of calculation by a proportionate estimate between the weight and bulk of articles was now admitted to be the true principle, according to the practice of the *East India* Company, though the allotment of weight for cubic measurement was greater according to that tariff, than in the calculation adopted in the *Danish* trade. That in taking this more favourable calculation as to stowage, the report should have taken at the same time the rate of freight given in the *East India* Company's trade, which was about £26 per ton, considerably higher than the rate allowed in this report. The result of these objections will be noted, when they are finally concluded.

(b) Late war.

stances,

stances, and no objection has been made to it. This consent can have proceeded only from the general understanding of the mercantile world, as to the propriety of such allotment. Since it is disputed, however, in this instance, it is hoped, that the court will sanction by its decree, the rule which has hitherto prevailed on the general understanding and agreement of parties.

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On the other side, Laurence.—However many cases may have passed by consent on this point, the Court will, it is presumed, pause a little before it gives a judicial sanction to any such rule. The captor is the person suing out the commission in the first instance, and if he is at liberty to do this at the expence of the cargo, he may, in many instances, collude with the master of the ship, and say, "take your vessel, and be gone," and thus send away the person whose duty it might be to claim, or at least to give the necessary information to the correspondent of the owners of the cargo. The cargo will be detained by these means in the hands of the agents of the captors to their emolument. The captor is the person first charged with the expence, and he cannot shift it off on the claimant, without shewing that it was specially necessary for the preservation of the cargo.

JUDGMENT.

Sir *W. Scott.*—This is the case of a cargo purchased in the colonies of the enemy, a trade exposed to particular suspicion, and in which the same degree of proof, which may be sufficient in ordinary cases, may not always be satisfactory. When the master sailed from *Hamburgh*, the claimants told him that they were

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the owners of the cargo, but gave him no instructions to claim for them in case of capture. On being brought into this country as a prize, he claimed the ship, but not with any precipitation, or in any such manner as to raise the slightest suspicion of collusion. The cargo required further proof: The master was under no obligation to stay for it, nor had the captor any right to detain him, or to make a warehouse of his ship. When the vessel is liberated, the cargo must be preserved somewhere. The use of warehouses becomes absolutely necessary, and for the benefit of those ultimately entitled to the property. Instead of being a measure likely to lead to collusion, between the master and the captor, it appears to me to be no inconsiderable check on the captor, that he should have this heavy expence to pay, if, at last, he obtains condemnation. He would rather be induced to keep the ship as long as he can. At present I shall abstain from laying down any general rule upon this question, without farther deliberation. Under the circumstances of this case, the expence appears to have been incurred from a necessity arising out of the cargo, and I shall decree them to fall as a charge on the property (a).

Jan. 27th,
1804.

British merchant settled in Holland at the breaking out of hostilities, but taking early measures to remove—restitution.

THE OCEAN, HARMSEN.

THIS was a case of a claim given on behalf of Mr. F——, a *British*-born subject, who had been settled as a merchant in *Flushing*, but who, on the appearance of

(a) In the case of the *Peggy*, March 8, 1804, a similar decree was made, that the captor should be liable to the Marshal for the expences of appraisement and unlivery, but that he should be considered to have a demand against the goods for such expences, to be charged rateably on all the property restored.

approaching

approaching hostilities, had taken means to remove himself, and return to *England*.—The affidavit of the claimant stated—That in the month of *July* 1803, he actually effected his escape, and returned to this country; that he had actually dissolved his partnership; and that he had continued to reside in *Holland* after the war, only under the detention so unwarrantably applied to all *Englishmen* resident in the country of the enemy at the breaking out of hostilities.

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OCEAN.

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1804.

JUDGMENT.

Sir *W. Scott*.—This claim relates to the situation of *British* subjects settled in foreign states in time of amity, and taking early measures to withdraw themselves on the breaking out of war. The affidavit of claim states, that this gentleman had been settled as a partner in a house of trade in *Holland*, but that he had made arrangements for the dissolution of the partnership, and was only prevented from removing personally, by the violent detention of all *British* subjects, who happened to be within the territories of the enemy at the breaking out of the war. It would, I think, under these circumstances, be going farther than the principle of law requires, to conclude this person, by his former occupation, and by his present constrained residence in *France*, so, as not to admit him to have taken himself out of the effect of supervening hostilities, by the means which he had used for his removal. On sufficient proof being made of the property, I shall be disposed to hold him entitled to restitution (*a*).

THE

(*a*) So in the *Doornhaag*, restitution was decreed to *A. B.* removing from *Holland*, of a ship and parts of the cargo allotted to him on the dissolution of the partnership, for the purpose of his removal. The situation of *British* subjects wishing to remove from the country of the enemy on the event of a war, but prevented

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1804.

THE ISLAND OF TRINIDAD, and its Dependencies, with the Saint DAMASO, captured in port, and other Ships destroyed, during the late war.

Joint capture in the surrender of Trinidad.—

Time of surrender how considered, not from the first negotiation for capitulation.—Whether from the agreement to capitulate, or from the formal execution of the articles, *quære*.—The facts in this case did not render it necessary to decide that point.

THIS was a question on joint capture, as to the right of several ships to share in the capture of the island and its dependencies, and also in a *Spanish* squadron, captured by the *British* forces under the command of Admiral *Harvey* and General Sir *Ralph Abercrombie*.

JUDGMENT.

Sir *W. Scott*.—This question arises on the capture of *Trinidad*, as to the title of the several parties to share in the property taken at land, and in the capture of one vessel, and in the distribution of his Majesty's bounty on the destruction of others. The parties claiming to share stand on very different grounds, and the question is, which of these five ships are entitled to any, and to what part of this capture. The claims are given severally on the part of the *Alfred*, *Dictator*, *Bittern*, *Zephyr*, and *Pelican*. It appears that the *Zephyr* and *Pelican* were a part of the force originally destined on this expedition, described as an expedition for the capture of the island of *Trinidad*, and the destruction of a *Spanish* squadron which was known to

vented by the sudden interruption of hostilities from taking measures for removing, sufficiently early to enable them to obtain restitution, forms not unfrequently a case of considerable hardship in the Prize Court. In such cases it would be adviseable for persons so situated, on their actual removal, to make application to government for a special pass, rather than to hazard valuable property, to the effect of a mere previous intention to remove, dubious as that intention may frequently appear under the circumstances that prevent it from being carried into execution.

be

be lying there. These were the two objects of the expedition ; and if I could go along with the argument, and consider these objects as inseparable, and as forming one integral capture, there might be less difficulty in determining on the whole claim of these two ships. The island, its fort, and ammunition stores, may be taken as one definite collected thing ; but there is surely a great distinction between them, and such moveables, as a squadron of ships, which might be there to-day, and gone to-morrow. It would, I think, be a great deal too much to say, that the capture of the island is necessarily to be identified with the capture of the ships. The proceeding might probably be different for the reduction of these two descriptions of force. The ships might be taken months before the island ; and if the captures were at different times, they would stand on very different considerations ; and it would by no means follow that the *Zephyr* and the *Pelican* were entitled to share in the ships, because they might be entitled to share in the capture of the body of the island. Then what other principle is there on which the claim of these ships, as to the *St. Damaso*, can be sustained ? It is said that they composed part of the original force sent on this expedition, and that if they were detached on any collateral purpose tending to the common service, they would still be entitled to share. I fear the facts will not bear out the position, since the purpose on which the *Zephyr* separated was, to chase a *French* privateer, which might have led her off to a very great distance. Can it be contended, that, if the transaction had taken place during her absence, she would have been entitled to share ; I think not. If the detachment had been for a purpose clearly collateral, such as the fetching provisions

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or ammunition, it might have been different; but this is a distinct service on which the *Zephyr* was detached; and the *Pelican* separated by stress of weather, and had in effect never joined the squadron. The necessary facts, therefore, are not laid, on which the principle of association can be applied to their case, and it will be utterly impossible to sustain their claim on that ground. Then what other ground is there? I have already said, that the capture of the ships is not to be identified with that of the island; and therefore if it is contended that they are entitled by reason of having joined the squadron, it must be shewn that the junction had taken place at the time of the capture of the vessels; and this must be made out upon clear and distinct proof, and not merely upon evidence of a vague and conjectural nature. On this point there is indeed the evidence of a person, to whom the Court would be induced to pay great attention, as, to other distinguished qualities, he adds that of a mind entirely above all prepossession or bias. This gentleman, Admiral *Harvey*, states it "to be his opinion, that these vessels must have been in fight on the evening before the ships were set on fire, and the *St. Domingo* was taken." He states the grounds of his opinion, which appear to be perfectly rational and just, and if supported by the evidence on the part of the vessels themselves, they might have been very material. But the Court is bound to expect that the *being in fight* should be proved by some direct evidence, applying to the fact, and not merely by opinion, formed upon the conjectures of any persons, however respectable they may be. The result of the evidence on this point falls very short of the necessary effect. Mr. *Ward* says only, that "when they

they joined, they saw the remains of a frigate burning." This by no means proves, what can be considered *as a presence at the time*, when the destruction of some ships, and the capture of the *St. Damaso* took place. The manner in which the witness expresses himself rather implies, that they had been already destroyed; and it would be a construction very wild and unwarrantable to hold, that, if they arrived whilst the ashes were smouldering, they would still be in time. It is said, that they heard the explosion.—But it is a common phrase not more contemptible for being common, that hearing is not seeing; the explosion of such a body as a ship of war, would be heard to a stupendous distance. It is a well known fact, that, in the famous battle in the *Downs*, the explosion was heard in *St. James's Park*, and was made the foundation of a mathematical calculation by *Sir William Petty*, with respect to the velocity of the progress of sound; so, with regard to the conflagration, the atmosphere would be illuminated to a prodigious distance, but it would be ludicrous to say, that all, who were within the reach of these appearances produced by the fire, are to be taken in law as present at the occurrence itself. As to the *St. Damaso*, that vessel was taken afterwards without conflagration or explosion, *sub silentio* and *sub tenebris* both. Upon the whole case of these two ships, then, I am of opinion, that the purpose on which they had separated, was not collateral or subservient to the general design, but divergent and distinct; that they were not present at the capture and destruction of the squadron, and that it would be going much farther than the Court is disposed to go, to say that they can be entitled to share in that part of this capture.

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As to the capture of the island, it does appear that they were in fight the preceding evening, and therefore whether the point of capture is taken, either at the first overture for surrender, or at the capitulation, or at the formal signing, these ships were clearly present, and entitled to share in that part of the general capture. The claims of the three other ships stand on a different ground. The *Dictator* and the *Alfred* had not been under the command of Admiral *Harvey* before, but had been sent to reinforce him, and join in the operations. The *Bittern* had been under Admiral *Harvey*, but had been sent away to *Barbadoes* for letters and dispatches, not with orders to join specifically at *Trinidad*, but wherever she could find him. As to these vessels, the question is, Whether they had arrived in such time, as to be present at the actual reduction of the island? which makes it necessary to determine, what is to be taken as the time of capture, whether the first overture of surrender on the evening before, or the final agreement, or only the actual signing of the capitulation; it being equally clear, and admitted, that at the first period, they were *not* present, at the two latter periods, *they were*. Now, I cannot but think, that it would be too much to say, that the transaction of the evening before their arrival was a complete and absolute agreement, because many things might have occurred to defeat such a negotiation; and it would, I think, be to place an important question of this kind on a very uncertain footing, if the actual capture could be dated from the moment of the first overture. Terms were to be entered into: Of these some might be rejected as too hard on one side, or as too indulgent on the other. The negotiation might, in the mean time, be broken off. A disposition to surrender was expressed on the
even-

evening, but a great deal of deliberation was necessary on the reciprocal propositions. Frequent messages passed the next day under a flag of truce, which shewed that much was yet to be done. It would, I think, be too much to say, that the surrender could be considered as complete, till the next morning when the capitulation was actually agreed upon. At this time the ships were certainly in sight; Admiral *Harvey* says, "that they were there before the signature;" and he infers, I think, upon good grounds, that they had been seen from the island, and were themselves within sight of the island, before they were descried from the fleet. The evidence does afford a reasonable presumption, that they were there before the actual agreement of surrender; and therefore without bringing into discussion, how far it might have been sufficient to have arrived before the signing and formal execution of the articles, I shall pronounce them entitled to share in the capture of the island, but not in the capture of the ships which took place the evening before.

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1804.

NOSTRA SIGNORA DE BEGONA, YBRINIGA,
Master.

Jan. 31st,
1804.

IN this case a question arose respecting the contraband quality of rosin, going from *St. Sebastian* to the port of *Nantes*.

Contraband-
rosin to a
part part of a
military equip-
ment, not con-
traband.

On the part of the captors, the King's Advocate contended—That it was an article much used as an ingredient in various military preparations, and that it was to be deemed contraband.

NOSTRA
SIGNORA DE
BEGONA.

Jan. 31st,
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JUDGMENT.

Sir *W. Scott*.—Are there any cases in which this article has been held to be contraband, on a destination to a port merely mercantile? If it had been going to a military port of the enemy, I should have had no hesitation, as there are many cases in which, under such circumstances, it has been deemed contraband. —Going to a mercantile port (*a*), it is not, I think, so decidedly of a warlike nature, as to be excluded from the favourable considerations that are applied to other articles *ancipitis usus*. I shall therefore decree restitution.

Feb. 7th,
1804.

LA VIRGINIE, COIGNEAU Master.

National character of a native Frenchman, an asserted American subject, but personally present in *St. Domingo*, shipping goods for *France*, and described in the evidence as a French merchant. The native character held to be reversed.

THIS was a question on the national character of the claimant Mr. *Lapierre*, claiming property shipped by him in *St. Domingo* for *Bourdeaux*. The affidavit of claim stated him to be an American subject; and in his attestation, which was exhibited in further proof, it appeared that he had sailed from *New York* to *St. Domingo* in September 1802.

In support of the claim it was argued—That he was to be taken as a person domiciled in *America*, though absent on temporary business in the colony of the enemy at time of the shipment; that it did not appear how soon he had again returned to *America*, farther than that he was there in August 1803, when the attestation was made.

(*a*) *Santa Bona Ventura*. Rofin on board a Portuguese ship to *Nantes*, restored to the owner of the ship. Dec. 12th, 1747.

On

On the other side it was said—That his name implied him to have been a native of *France*, and that his return to *America*, after hostilities, would not operate to protect this property, shipped by him as a person resident in *St. Domingo*.

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VIRGINIE.

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JUDGMENT.

Sir *W. Scott*.—I should entertain no doubt in this case, if it appeared that Mr. *Lapierre* was originally a native of *France*, because it is always to be remembered, that the native character easily reverts, and that it requires fewer circumstances to constitute domicile, in the case of a native subject, than to impress the national character on one who is originally of another country. If it could be inferred, that he had been originally a *French* merchant, and was at the time of shipment resident in *St. Domingo*, and shipping property to *Old France*, I should have no hesitation in considering him as a *Frenchman*. Had the shipment been made for *America*, his asserted place of abode, it might have been a circumstance to be set in opposition to his present residence, and might afford a presumption that he was in *St. Domingo* only for temporary purposes. But this is a shipment to *France*, from a *French* colony, and if the person is to be taken as a native of *France*, the presumption would be, that he had returned to his native character of a *French* merchant. Then as to the point, on which I say the only doubt remains, the depositions of the master may, I think, be taken to supply that deficiency. He says, “that he received the cargo from *French* merchants, and that it was the property of the *ladars* and other *French* subjects.” This repre-

LA
VIRGINIE.

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presentation does very much fortify the presumption, that Mr. *Lapierre* was considered by the master as a *Frenchman*, and that he was resident at *Saint Domingo* on the ordinary footing of other *French* merchants. On this view of the case, I shall pronounce his claim *subject to condemnation*.

Feb. 13th,
1804.

THE ANNE, BICKNELL.

(Instance Court.)

Claim of salvage
on rescue of a
hulk ship, not
substantiated.

THIS was a case of salvage, brought by the owners and master of the *Elizabeth*, a slave ship, for salvage services alleged to have been rendered to the *Anne* on the coast of *Africa*.

It appeared that the *Anne* had been in considerable distress from an insurrection of her slaves, but that this insurrection had, in fact, been quelled by her own crew, on the night before the *Elizabeth* came up. A second insurrection was alleged on the part of the *Elizabeth*, but not proved. On this and other facts relied on in numerous affidavits, the Court expressed an opinion generally to the following effect.

JUDGMENT.

Sir *W. Scott*.—This demand is made against the ship and a valuable cargo for salvage, but I do not think that the claim is in any degree supported. Two pleas are set up: First, a rescue from an insurrection of her own slaves; but that appears to have

have been subdued before the *Elizabeth* came to her assistance. A second insurrection is also alledged of the *Butlers* and *Linguisters*, who are officers of the nations of the coast, with whom they were carrying on their traffic; but this is not in any manner proved. A different turn is now attempted to be given to the claim of salvage, by resolving it into a general superintendence, and assistance rendered to the master of the *Anne*, who was almost entirely deprived of his own crew, and was himself disabled from continuing in the command and management of his vessel, by illness. Several of the people who appear to have gone on board to render assistance, were paid at the time. In the whole circumstances of the case there is not a pretence for constructing a claim of salvage on such services. If any rescue had been effected out of the hands of the insurgent slaves, I should have pronounced for salvage, as I did in a former case. For although there may be a general duty incumbent on all persons to render assistance to others in distress, yet when there is a danger incurred, and a rescue effected, it appears to me to be an act justly entitled to remuneration, as a salvage service. No such case is made out by these parties, and I shall dismiss the suit.

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ANNE,

Fe.b. 13th,
1804.

Supra, vol. 4,
P. 223.

Feb. 17th,
1804.

REBECCA. MADDICK,

(*Instance Court.*)

Bottomree bond put in suit originally on the part of a French merchant in 1792—suspended during the last war—not enforced during peace, but now attempted to be farther prosecuted on the part of the British merchant, to whom it was endorsed—not allowed to be put in execution under the original proceedings.

THIS was a question on a bottomree bond, executed in *Marseilles* in 1792, by the master of an *English* vessel, to Mr. *Guerin*, a merchant in that city. The warrant was extracted 24 *December*, 1792, by Mr. *Thelluffon*, on the part of the *French* merchant.

On the breaking out of the war, the defendant appeared under protest pleading alien enemy. In 1796, an answer was given in to the protest, and a reply to that answer, and nothing since was done by the parties till *March* 1803, when Mr. *Thelluffon* continued the proceedings in his own name, stating that the bond had been transferred to him, that he had paid the money, that the original bond holder had become a bankrupt, and that he had no other means of recovering re-payment of the money advanced.

Against the bond, Arnold and Swabey contended—That the same objection that existed in 1793, “*of alien enemy*,” applied equally at this time; and that the bond could not be enforced now in favor of the original holder; that the opportunity of recommencing the suit in the interval of peace had been waived; and that after this lapse of time, the other party would naturally consider himself as relieved from all farther observance of justice on this demand; that as he had appeared originally under protest to the jurisdiction of the Court, it was not necessary that there should be a formal dismissal, that it would not be reasonable that

that the suit should now be taken up *de novo* on the part of Mr. *Tbelluffon*.

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On the other side the King's Advocate and Robinson contended—That the interest in bottomree was in its nature transferable, and had in this instance been regularly transferred, by indorsement, to Mr. *Tbelluffon*, in the course of his dealings with the original holder; that the first commencement of these proceedings was in *December* 1792, before hostilities, and when the objection of alien enemy did not apply; that with respect to the original holder, as there was no objection to his competency at that time, his right would have revived after the cessation of hostilities; that, in the present form, the objection to the *persona standi in judicio* would be obviated as well by transfer to an unobjectional person, as by a removal of the obstacle applying only to the original holder by reason of the war existing between the two countries; that it was but a question of form, whether the proceedings, on the part of Mr. *Tbelluffon*, should be engrafted on the former proceedings, or be commenced *de novo*; and that it was not a conscientious objection to be made on the part of the Defendant—for whom the money had been received, and *bona fide* converted to the service of his ship.

JUDGMENT.

Sir *W. Scott*.—The warrant in this case was taken out in *December* 1792, by Mr. *Tbelluffon*, describing himself as the agent of Mr. *Guerin*, a *French* merchant now become an alien enemy, and consequently a person, on whose behalf the Court could not, on any ge-

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neral grounds, sustain the claim, or enforce any interest. This has been at all times so fixed a principle in these Courts, that even in cases of ransom, which were formerly legal contracts, and contracts arising out of the events of war, the ransom could not be put in suit on the part of the enemy : Proceedings were always carried on against the owner in the name of the hostage suing for his liberty. It is true, indeed, that a bottomree bond is a negociable interest, which may be transferred and put in issue by the person so acquiring it. But the *French* merchant is the person here described as interested, who now stands under the same incapacity as he did before, Mr. *Thelluffon* being only the agent instituting the suit in his behalf. There can be no doubt, therefore, that the original protest was well founded. The parties should have been dismissed, and then the action might have been entered on the part of the present holder in his own right. But this has not been done,—and now, after an interval of twelve years, during *all which time*, I am told, that Mr. *Thelluffon* might have followed up the proceeding on his own behalf, I cannot think it a reasonable demand on the Court, to give parties the advantage of a stale and antiquated claim, to suffer them to make the Court the depositary of their slumbering rights, and then to come and revive them, when from lapse of time it is become utterly impossible to ascend to the whole justice of the case. It is said, that there is no statute of limitations applying to such a case.—Perhaps not. Indeed there are few questions in these Courts, to which any precise limitation is prescribed; but there is surely a principle of limitation, in the administration of every system of jurisprudence, to be derived

rived out of the nature of things, which does entitle the Court to avail itself of the universal maxim "*Vigilantibus, non dormientibus subveniunt leges.*" In questions of bottomree, more especially, the Court is bound to expect particular vigilance; because, although bonds of this kind are to be supported with a high hand, when clear and simple, they are, in many respects, things to be narrowly watched. Bottomree is a transaction which affords great opportunities of collusion; and therefore on the very account of the importance given to these bonds, they are to be pursued with exact attention, and with very active diligence, in order that the Court may have the opportunity of considering them in their recent origin, and with a view to all the circumstances on which their honest validity may depend. It may, perhaps, be difficult to point out the Statute Law, or precedent, by which this enquiry is barred; yet adverting to the considerations which I have thrown out, I do not think it incumbent upon me to lend the functions of the Court, to enforce a bond which has been suffered to sleep so long, after some of the parties are become bankrupts, and a thousand other transactions have mixed themselves with their affairs. The objection is not to be considered as resting wholly on form: Form, in this instance, is in no small degree the real substance of this case. The warrant was entered on behalf of persons now become alien enemies. *Their* claim the Court cannot sustain; and as to the interest of Mr. *Thelkuffen* under the transfer, it is not such a one as the Court will, after this interval of time, think itself bound to enforce. As the parties have appeared originally under

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then bear the *American* character; but the answer is obvious, that although the treaty was of that date, it was not at this time ratified, and as the effect of a Treaty depends entirely upon the ratification, the mere engagement on the part of *France* would not be effectual to impress the *American* character, at the same time, that it may be taken as an act of ownership, and as strong evidence of the complete possession which *France* conceived herself to have obtained of that colony,

On the other side, Arnold and Swabey.—Whatever engagements might have been entered into by Treaty, the national character of the place could not be deemed to be altered, till that engagement was carried into effect, and actual possession had been conveyed under it. This is to be contended, on the simple principle common to all law, that possession is the substantial title of property, and that without that, the strongest speculative interest is only a right *to* the thing, but not *in* the thing, a right to demand possession, but not the full right of property itself. Till possession was actually given, no change of sovereignty can be held to have taken place. On this short statement of the general law, as applicable to all property, it will be sufficient to rest the whole question as to principle. It is material, therefore, to enquire what possession had actually been taken in the present instance. It is not necessary to dispute whether the whole establishment should have arrived or not; because here no part of the establishment could be said to have arrived, inasmuch as the constituent character, the person charged with the power of constituting this settlement to become a part of
the

the *French* dominions, *had not* arrived. Mr. *Lauffart* had been sent forward as a subordinate officer, to arrange matters for the delivery, but the capacity to accept delivery was never communicated to him, as the accredited officer of *France* for that purpose. A delivery to him, not authorized by some public commission to accept, would not have been a delivery in law to *France*, nor have enured to the due execution of the Treaty. That Mr. *Lauffart* found means to circulate something like a public proclamation, is not necessarily a proof of sovereignty; his own letters, and several expressions to be found in these papers, shew that it was not so considered at *New Orleans*. One letter mentions only "that Citizen *Lauffart* had published a high-sounding proclamation, and that he was waiting to see the effect." The proclamation itself does not contain a word indicating that he had taken possession. In another letter it appears more obviously that he had not, from these terms, "If the taking possession had taken place, I should have given the nationality to Mr. *Merrian*, and he would have put himself in rule for obtaining it; as it has not, I have recommended him to go to *France*, &c." In the letters of the *Peggy*, the mention of the *Spanish* Commissioner, and of the formal possession to be transferred, is spoken of as a thing *in futuro*, and as a form essentially necessary to invest the Government of *France* with the full and complete dominion. So the passages that have been referred to, respecting the *French* flag, describe it as intended to convey equal privileges, *as if the possession had taken place*, furnishing, in that expression, a necessary inference, that the actual possession had not been transferred. In addition to all this evidence,

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there is the corroborating testimony of the *Spanish* Governor, in a certificate of *November* 18th, which states “ that *Louisiana* was then ruled and governed “ by the *Spanish* laws, the cession by his Catholic Majesty not having taken place. That although “ Citizen *Lauffart*, the colonial Prefect, had resided in “ this city from the end of *March*, for the purpose “ of concerting with the *Spanish* Government, arrangements preparatory to the delivery ; he had not exercised, nor could exercise, any jurisdiction, by “ reason that the power of the *Spanish* Government “ continued entire till the moment of the act of taking possession.” On weighing the whole of this evidence, the Court cannot but be convinced, that no actual possession had taken place. As to what is said of the subsequent transfer to *America*, that proves no more than that *France* conveyed her right, whatever that might be—full possession, if she had obtained so much,—or a mere prospective right, if, in fact, her own title was executory only, and not at that time carried into effect.

In reply, the King's Advocate and Laurence.—The argument on the other side amounts only to this, that no formal surrender had taken place ; but as to the importance ascribed to such a solemn act of delivery, it is not supported by any reference to authorities, nor is there any obvious reason pointed out, for considering that circumstance as essential to determine the national character of the place. The substantial incidents of a *French* settlement are more to be regarded, than the mere ceremonial of formal surrender ; and among the chief characteristics of a national establishment, is
to

to be reckoned that which appears in these cases, of an almost exclusive navigation to *France*. Could a public act of cession be deemed more material, than it has been shewn to be in the present argument, as between the two contracting nations, it would by no means follow that it was incumbent on a third power to acquiesce in all the subterfuges, by which it might be attempted to conceal the real character, and the substantial interests of the place.—The question has been argued only on the grounds of an ordinary transaction between the contracting powers. Whereas this important circumstance is to be taken into the account—That the rights of war have interposed to modify and controul the general rules, by which the question of property and national character is to be decided. Among the limitations arising out of such a state of things, one of daily application in this Court is, that if the bargain is complete, and the price paid, no delay in transferring the title, with a view of keeping off as long as possible the risk of the Belligerent party, will prevent that risk (a) from attaching on him. It is the ordinary rule applied to shipments, made *for the account of* the Belligerent party, but under an agreement that the neutral merchant shall sustain the risk in *transitu*. Analogous to that collusive expedient of retaining a nominal title in the neutral merchant, to protect goods really become the property of the Belligerent, would be the situation of this settlement, if it could be maintained, that *Spain*

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(a) *Sally, Griffiths*, supra, vol. 3. p. 300, and other cases.

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might hold a nominal possession for any length of time, for the benefit of *France*, by which *France* would reap all the advantages of a connection with the place, as a colonial establishment, without subjecting it to be considered as a *French* settlement. The conduct of the whole proceeding fully justifies such a representation. The agreement to cede was made clandestinely by the Treaty of *Idelphonso* in 1796. The price has actually been paid in the assignment of territory in *Italy* to one of the Family of *Spain*. The benefit of a colonial establishment has been substantially conferred, and therefore the question is not, by what system of jurisprudence the Court shall judge of the form necessary to a complete surrender, but whether in effect *Spain* has not continued to hold this settlement for the benefit of *France*, and subservient to the purposes of the *French* Government. In this point of view, whatever may be the qualifications which the parties themselves may attempt to put upon the actual title of property and national character, the Court will consider the question in substance, rather than in form, and with reference to the rights of war, which a third party has acquired in the event.

At the conclusion of the argument, the Court mentioned a case of *Wroughton* against *Mann* 1780, in which the question of sovereignty over a country ceded by Treaty, but not actually delivered, had undergone much discussion. The libel in that case was directed to be locked up, and the Judgment was reserved.

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Sir *W. Scott*.—The present question is a general one, respecting the situation, in which the people of a distant settlement are placed, by a Treaty of the State to which they undoubtedly belong, and by which they are stipulated to be transferred to another power. The case proceeded for a considerable time without dispute as to principle, on a mere enquiry into the fact of possession; under an understanding, as I apprehended, that if possession *had not* been taken by *France*, the *French* character could not be deemed to have attached. The question has however now been fully argued as to the principle of law, whether the Treaty did not in itself confer full sovereignty and right of dominion, and whether the inhabitants were not so ceded by that Treaty, as to become immediately *French* subjects. Another question has also been started, respecting the Treaty of *Idelphonso*, whether such a Treaty made clandestinely, as it is said, *during hostilities*, and with a provision that it should not take effect till after the war, is not to be considered in the light of a fraudulent covering of *French* interests, for the purpose of defeating the Belligerent rights of this Country. This latter question cannot, I think, fairly be brought into discussion; nor is it necessary to decide, what would be the situation of a neutral country, delivering up its rights to one Belligerent, and continuing to nurse and feed the colony for the benefit of that Belligerent during the war. It is, I say, needless to enquire, in the present case, what rights of war would accrue

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to the other Belligerent from such a conduct; because *Spain*, very soon after the signing of that Treaty, became herself a party in the war, and was as much exposed to the attacks of this Country in all her settlements, as they could have been in the possession of *France*. It is impossible, therefore, that *Spain* can be said to have lent her aid and assistance, as a neutral Country during the war, to nourish and protect this colony as a colony of *France*. On the return of peace, no objection in the way of protest or public reclamation was made against the Treaty on the part of this country. I shall therefore dismiss this branch of the argument, as not fairly supported by the circumstances of the case.—The other question of law, how far full sovereignty can be held to have passed by the mere words of the Treaty, without actual delivery, was in the first stages of this cause *not mooted*. As it has now been brought into discussion, it is fit that I should give my opinion upon it.

It is to be observed then, that all corporeal property depends very much upon occupancy. With respect to the origin of property, this is the Sole foundation, *Quod nullius est ratione naturali occupanti conceditur*. So with regard to transfer also, it is universally held in all systems of jurisprudence, that to consummate the right of property, a person must unite the *right of the thing with possession*. A question has been made indeed by some writers, whether this necessity proceeds from what they call the natural law of nations, or from that which is only conventional. *Grotius* seems to consider it as proceeding

ceeding only from civil institutions (a). *Puffendorf* (b) and *Pothier* (c) go farther. All concur, however, in holding it to be a necessary principle of jurisprudence, that to complete the right of property, *the right to the thing*, and *the possession of the thing* itself, should be united; or, according to the technical expression, borrowed either from the civil law, or as *Barbeyrac* explains it, from the commentators on the Canon Law, that there should be both the *jus in rem*, and the *jus in re*.—This is the general law of property, and applies, I conceive, no less to the right of territory than to other rights. Even in newly discovered countries, where a title is meant to be established, *for the first*

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(a) Que la deliverance de la chose meme que l'on transfère a autrui n'est nécessaire qu'en vertu des loix civiles.—*B. 2. c. 6. 1—4. Barbeyrac's Translation.*

(b) Cela posé, il est clair, que les conventions toutes seules suffisent pour faire passer d'une person à l'autre la propriété considérée purement & simplement comme une qualité morale, détachée de la possession; mais lorsque l'idée de la propriété renferme de plus un pouvoir physique, que met en état de faire actuellement usage de ce droit il faut, outre l'accord mutuel, que la chose meme soit délivrée. C'est une suite des maximes naturelles de la raison, & non pas des seuls réglemens du droit positif.—*Puff. l. 4. c. 9. § 8.*

(c) Quoiqu'il soit de cette question traitée selon le pur droit naturel, que nous abandonnons à la dispute de l'école, le principe du droit Romain, que le domaine de propriété d'une chose ne peut passer d'une person à une autre, que par une tradition réelle ou feinte de la chose, étant un principe recu dans la Jurisprudence, comme en conviennent ceux, qui sont de l'opinion contraire, nous devons nous y tenir.—*Pothier, v. 4. p. 437.*

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time, some act of possession is usually done and proclaimed as a notification of the fact. In transfer, surely, where the former rights of others are to be superseded, and extinguished, it cannot be less necessary that such a change should be indicated by some public acts, that all who are deeply interested in the event, as the inhabitants of such settlements, may be informed under whose dominion, and under what laws they are to live. This I conceive to be the general propriety of principle on the subject, and no less applicable to cases of territory, than to property of every other description.

It will be only necessary to enquire then, whether the practice has been conformable to what we might conceive to be the true principle of law. On this point no doubt can be entertained. The *Corps Diplomatique* is full of instances of this kind: Where stipulations of Treaties for ceding particular countries are to be carried into execution, solemn instruments of cession are drawn up, and adequate powers are formally given to the persons, by whom the actual delivery is to be made. In modern times, more especially, such a proceeding is become almost a matter of necessity, with regard to the colonial establishments of the States of *Europe* in the new world. The Treaties by which they are affected may not be known to them for months after they are made. Many articles must remain *executory* only, and not executed, till carried into effect; and until that is done by some public act, the former sovereignty must remain. Amongst the instances that might be cited to shew what the practice has been on this

this subject, I will mention only a few. On the cession of *Nova Scotia* to *France* by Treaty, 21st July, 1667, the act of cession, which purports to be made in consequence of the Treaty, was not drawn up till February 1668, when full powers were sent out to deliver up the settlement to the person who should be empowered to take possession, under the great seal of *France*.—Another instance, which comes nearer to the present question, is to be found in the proceedings which took place when this very settlement of *Louisiana* was ceded by *France* to *Spain* in 1762. It passed by act of cession drawn up in solemn form, and dated more than a year after the Treaty itself. Indeed modern history abounds in such instances. If to these it were necessary to add the authority of a judicial recognition of the principle, I think the case of *Wroughton* against *Mann*, to which I alluded on the former day, is strongly in point. That was a case before the delegates on appeal in a revenue cause. The Act of Court pleaded, “that *East Florida* was ceded to *Spain* by Treaty of 1803, and that eighteen months were allowed for emigration. 2dly. That notwithstanding the Treaty, the *English* laws continued till the *Spanish* Government arrived and received delivery from General *Tonin*; and the formal instruments, under which possession was afterwards taken, were exhibited.” The offence charged was an act of importation contrary to the *British* Revenue Laws, long after the ratification of the Treaty, but before the arrival of the *Spanish* Governor, and the actual delivery. Objections were taken to the allegation, similar to the arguments which have been

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urged in the present case, viz. "That the country had passed to *Spain* by virtue of the Treaty; that the continuance of *British* possession was but an usurpation; and that the offence was no longer amenable to the *British* laws. If that could have been sustained, the plea must have been bad; but it was not so held. The Court of Delegates were of opinion, that the contract was merely *executory*, and till it was carried into execution, the *British* possession, and the *British* laws," continued in full force. On this ground the allegation was admitted. The cause proceeded, and went off afterwards on failure of proof as to the fact; but the opinion of the Court, as to the law, was fully declared by the admission of such a plea. I am of opinion, therefore, that on all the several grounds of reason or practice, and judicial recognition, until possession was actually taken, the inhabitants of *New Orleans* continued under the former sovereignty of *Spain*.—Then as to the fact of possession. There are undoubtedly some expressions in these letters, which might raise a supposition, that the person who had arrived, had taken possession on the part of the *French* Government. A letter from a *French* Loyalist expresses "the expectation of *French* troops and a civil officer to take possession, and make *Frenchmen* of us, who are now *Spaniards*." It is afterwards said, that citizen *Lauffart* had arrived to take possession. A proclamation is issued by him, which is drawn up very much in the present tense; but that mode of speaking is used also, I observe, relative to some circumstances which had certainly not taken place, as "that the military Prefect brings with

with him troops, &c." when it is certain that not a soldier had appeared. From other parts of the evidence, I think it is sufficiently clear, that he was either not the person who was charged with the act of taking possession, or that some considerations had induced him to defer it. A letter written by him states, "if the taking *possession had passed, &c.*" There is also the Convention entered into: "That the *French* flag should enjoy the same privileges, *as if the possession had actually* been taken." These passages strongly indicate that the actual delivery had not passed.—Then comes the certificate of the *Spanish* Governor, accompanied by an instrument equally formal, from the *American* Consul. These are, I think, decisive as to the fact. They state, that Citizen *Lauffart* had arrived in *March* to make the necessary arrangements, but that no cession had taken place, and that he had never exercised any jurisdiction. On the whole of this evidence I am led to conclude, either that Mr. *Lauffart* was not the person authorized (a) to take possession, or that the act of cession

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(a) It appears from the *American* papers, Dec. 13, 1803, that Mr. *Lauffart* was the person who afterwards took possession; "that a few days previous to that date, the province of *Louisiana* was, with all due ceremonial, surrendered to the *French* Republic. The Governor *Salcedo*, and the Marquis de *De Gessa Calvo*, acted as Commissioners on the part of his Catholic Majesty; and the colonial Prefect, Citizen *Lauffart*, as the representative of the *French* Government."—From the same authority, Jan. 23, 1804, it appears that, 20th Dec. 1803, possession was formally ceded by *France* to the *American* Governor, with appropriate ceremonies.—The concluding paragraph describes the new establishment to

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cession had from some causes been deferred. In this situation of things, it appears to me, upon the grounds before stated, that the colony must be considered as continuing, at the time of capture, under the dominion of *Spain*, and consequently that these persons, as *Spanish* subjects, are entitled to restitution.

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Joint capture—
All-gation— ob-
jected, that
claimant was not
in sight at the
time of capture,
and that it was
not averred to
have been
known to the
capturing ship,
or to the ship
captured, that
the claimant was
in chase.—
Facts necessary
to be established,
the first by
direct evidence,
the other by
implication.

THIS was a case of a demand of joint capture, on the part of the *Camperdown* cutter, against which it was objected, “that the allegation did not aver the asserted joint captor ever to have been seen by the captured vessel.”

On the part of the actual captor, the King’s Advocate.—This capture was made so long ago as 17th April, 1800, and has been the subject of a very long litigation, without any interposition on the part of the asserted joint chaser, till the 5th August 1803. This delay must be taken as affording a strong inference against the reality of the claim now set up; even on the mere ground of delay, a question might justly be raised, Whether the actual captor, being suffered to proceed alone, and at a great expence so long,

have consisted principally of *Frenchmen*. “The Governor has confirmed the Municipality, which consists of a Mayor, Council, Secretary, and City Treasurer. They are all *Frenchmen*. The same duties are paid as under the old regime.”

should not be protected against latent claims of this kind, that were never advanced till the main interests of the cause were successfully established. It will, at least, be required that a very clear case should be made out to support the claim, especially as the preparatory examinations make no mention of such a vessel being in sight.— The plea set up is, that the *Earl Spencer* and the *Camperdown* were both lying in *Dover Roads*, when the boatmen brought intelligence of the prize. The *Earl Spencer* sailed first at eight o'clock. The cutter, receiving the intelligence afterwards, and learning the course that the *Earl Spencer* had taken, followed at nine. It is alleged, that, at one o'clock, the *Camperdown* saw the *Earl Spencer* and the prize, but it is not averred that the prize saw them, only that the *Earl Spencer* did. A fog came on, and they pursued their course till four o'clock. The capture was made at one, as it is alleged, at the distance of about seven or eight miles from the *Camperdown*, and so near as to be within hearing of the guns. It is alleged that the *Earl Spencer* knew them to be in chase, but not that the prize had any such apprehension, only that they were near enough to hear the guns, and to *have been* seen at the time of the capture, if sight had not been intercepted by a thick fog. It is not averred that they were in sight at the time of capture, nor that the captured vessel knew them to be in chase. One of these facts is essentially necessary; for although a joint chaser may share, though obscured at the time of capture by an accidental fog, such a claim has never been supported, unless when it has appeared that the ship

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ship was known by the enemy, as well as by the friend, to be in chase.

On the other side, Laurence.—If the facts of the claim can be well founded, they will not be barred by the objection to the time at which they are brought forward. Notice was given much earlier of an intention to claim, and nothing more can be required. It is by no means necessary that the party should actually interpose in the litigation, inasmuch as he cannot be made a party to the suit, nor is he subject to costs and damages, the whole proceeding being properly the act of the captor. As to the merits of the case, it is admitted, that a ship intercepted by a fog from being in sight, may maintain a title to share. The case turns therefore upon the question of joint chasing.—

The Court interrupted the Counsel, observing—All that is now averred in this allegation is, that the persons on board the *Camperdown* saw the prize. That alone will not be sufficient, as it is a principle of law which has been laid down again and again here, and in the Court of Appeal, that a case of joint capture cannot be proved only by witnesses on board the ship claiming.

Laurence.—The situation of the vessels may be proved by the log.

Court.—This allegation is given after a very heavy litigation, in which the interest of prize altogether has

has been for a long time contested in this Court and in the Court of Appeal. I cannot but think that at this late time the claim comes forward very unfavourably, after very heavy expences have been incurred. It is certainly not necessary for a joint captor to give an appearance throughout the whole of the suit; that would only be to incur additional expence. At the same time, it may be a great hardship on the actual captor, that he should be exposed to the whole burthen of the litigation, whilst the question is in doubt, and that the constructive captor should afterwards come forward to share in the event, without taking any part of the risk. I cannot but think that it would be a fortunate circumstance, if the Court should lay down some rule upon this subject, supposing it competent to do so, that an allegation should not be admissible, unless it is given during the suit, and before the actual captor has fought the whole battle. The constructive captor will still retain considerable advantage in not being subject to costs and damages; because as the whole act of capture *is the act* of the captor, he is the person that must sustain it. It will be for the further consideration of the Court, whether some such rule may not be consistent with justice, and well suited to the general convenience of all parties. The allegation, as it now stands, cannot be admitted, since it has been repeatedly decided by the highest authority of the superior Court, that a claim of this kind cannot be established on the sole testimony of persons swearing in their own behalf, and that no such claim ought to be admitted. That the *Camperdown* should have *been known* to the *Earl Spencer* to be in chase, would not be a sufficient averment, because it might be

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be *known* only from information. If it can be alleged that the *Camperdown* was *seen* by the *Earl Spencer*, and that she was intercepted only by an accidental fog at the time of capture, it may support the principle, provided that fact is proved by the evidence of persons on board the *Earl Spencer*; for I have already said, that the evidence of persons on board the asserted joint captor alone will not be sufficient. If this fact can be established, it may also establish the fact, that she was seen by the captured vessel, as well as by the actual captor; for I shall certainly require both these facts to be established,—one by direct evidence, the other by implication and necessary inference. If these averments can be made, the allegation may be admitted.

February 28th.—The allegation not having been reformed, the Judge rejected the same.

LA VIRGINIE, COIGNEAU.

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1804.

Joint capture.—
Counter allegation, that the claimant had sheered off on a contrary route, under the particular circumstances of the case, rejected.

THIS was a case of joint capture on a counter allegation offered on the part of the actual captor, the *Miranda* stating, that the claimant in joint capture had discontinued the chase, and was standing on a different course at the time of capture.

On the part of the Claimant, the King's Advocate stated—That it appeared in evidence, that the *Minerva* had engaged the enemy at four o'clock in the morning, but having only one gun was beaten off;

off; that she dogged the prize through the whole of the day, and was in sight when the capture was effected in the evening by the *Miranda* appearing under *French* colours. That under these facts, if the schooner did stand aloof at the appearance of the *Miranda*, owing to her being under *French* colours, it could by no means be considered as such discontinuance of the chase, as would defeat the claim of joint capture.

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On the other side, Laurence.—The *Minerva* was a small tender, sent out to impress men, and carried one gun only, for the purpose of bringing to *English* merchant vessels. There was no *animus capiendi*, therefore, in her first purpose, nor any commission by which she was authorized to make captures. Under such circumstances, nothing short of actual assistance could be sufficient to establish a claim to share in prize. It is indeed alleged, that the schooner had attempted an engagement in the morning, but she was beaten off, and obliged to keep all day out of gun-shot. It is not to be imagined, therefore, that she could be an object of terror to the enemy, or that she could retain a purpose of resuming farther operations against this vessel. The fact is not denied that she was standing aloof at the time of capture; on the other side, *it is* not admitted, *but denied*, that this abandonment of her purpose was owing to the appearance of the *Miranda* under *French* colours.

JUDGMENT.

Sir *W. Scott*.—The question to be determined is, Whether the allegation, if proved, will have the effect

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fect of excluding the claim of joint capture brought by the Admiralty, in virtue of the services of this non-commissioned vessel (a). It appears that the schooner had maintained a severe engagement in the morning, and though beaten off, she had hung upon the enemy through the whole day. It cannot be denied, therefore, that there had been at first an *animus capiendi*; and it is, I think, to be inferred from her subsequent conduct, that the contest was not given up on her part, but deferred, until some more propitious opportunity of effecting the capture might offer. Had not this been her intention, she would have taken some other course, instead of continuing, as she did, within sight of the enemy through the whole day. The privateer came up, and, as it is represented in this *counter allegation*, chased first under *English* colours; and it is asserted, that the schooner *was at that time making off*. It is, I think, highly improbable, that after having hung upon the enemy all day whilst alone, she should have sheered off, on seeing another vessel under *British* colours join in the chase. Under the view which I have taken of the conduct of the schooner, scarcely any evidence would convince me of so improbable an act, as that she had at that time discontinued the chase; or if she at all altered her course, it must, I think, have been owing to the appearance of the *French* co-

(a) The schooner was one of several vessels sent out by men of war in the *Channel* to impress men, though without any authority to entitle them to make prize, for the benefit of their men of war.—*Vide supra Melamanc.*

lours, which it is admitted, *the Miranda* did at one time assume. The privateer afterwards fired a gun, and hoisted *English* colours; the prize struck, and immediately the schooner came up. All these facts fully persuade me, that she was in reality continuing the chase, and that if there was any falling off, it was only during the time whilst the privateer was under *French* colours, which, though not done with any view of deceit, might produce an alteration of purpose on the part of the tender, owing to the utter impossibility of accomplishing her design under such circumstances. The question being, Whether the facts alleged in this counter-allegation would, if proved, have the effect of excluding the *tender*, or rather the Admiralty in her right, and my opinion being that scarcely any evidence could support the averment, that the tender had sheered off, otherwise than owing to the appearance of the *Miranda* under *French* colours, I am inclined to pronounce that this counter-allegation could not have the effect of excluding the claim of joint capture, and that it must be rejected.

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THE MERCURIUS, JONASSEN.

Mar. 9th,
1804.

FOR the purpose of avoiding disproportionate expences in small claims, the Court had permitted property under the amount of £100 to be restored without the expence of a formal claim.

Property of small amount restored without the expence of a formal claim.—Rule framed to the extent of 100*l.* refused to 100 guineas.

In

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In this case, Arnold moved the Court to allow the same indulgence to a property estimated only at 100 guineas.

The Court said—That it was necessary to confine this indulgence to some definite amount; that whatever was the sum fixed, there would be always other sums just exceeding that, which might not be distinguishable in principle; at the same time, that it was necessary to adhere to the rule laid down.

Motion refused.

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THE JAN FREDERICK, BLOEDORNE.

Contract in contemplation of war, for the transfer of colonial property, *in transitu*, held illegal.

THIS was a question on the legality of a contract made for colonial produce, *in transitu* 10 May, 1803, before the war, but in avowed contemplation of war on the part of the contracting parties.

On the part of the Capture, the King's Advocate and Parsons.—This question relates to a very considerable quantity of colonial produce, in this and in other vessels, shipped as *Dutch* property, on board a *Dutch* ship and bound to *Holland*, but purchased *in itinere* by Mr. *Jonassen*, of *Emden*, under a contract of the 10th of May 1803. The case has been admitted to farther proof, and it now appears, from the affidavit of Mr. *Jonassen* and the letter exhibited, that the *Dutch* owners first applied to him in *March*, under apprehension of war, to neutralize the property, but that he refused; that they then offered to sell, and he acceded to their proposals,

pöfals and made this purchase. The contract stipulates that the *Dutch* owners should endorfe the bills of lading to the purchaser, on their arrival in *Europe*.

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It cannot therefore be considered as a complete transfer, so as to charge the title of property. But, independent of that objection it is a contract that could not be sustained in point of law, inasmuch as it is an established principle, that property cannot be transferred from the enemy *in transitu*, in time of war, or in contemplation of war. Exceptions have been allowed in favour of particular transfers made on the eve of hostilities, but only in cases where that event has been wholly unforeseen, and manifestly out of the contemplation of the parties. In this case, on the contrary, the contemplation of war, and the apprehension of capture, is the sole foundation of the whole proceeding. This purpose is admitted and avowed by the parties themselves, through the whole negotiation, so that no dispute can arise on the fact. On principle it comes directly under the authority of the *Negotie en Zeevaart*,

Supra, vol. 1.
p. 107.

the *Dankebar Africain*, and that whole class of cases: As to the fairness of such a transaction on the part of the purchaser, he is as much implicated in the unneutral purpose of protecting the property of the enemy from the danger of war, as Mr. *De Coninck* was in the case of the *Rendsborg*, by the same sort of avowal of the main object of the transfer, as passed between the parties in that negotiation.

On the other side, Arnold and Laurence.—As to the fact of the purchase, it is to be considered undoubtedly as a real and *bona fide* transaction on the part of the purchaser, who appears to have been

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so far from lending himself to defeat the rights of war that he had rejected every proposal of advantage that had been made to him for that purpose. It is also a full and complete transfer in point of law, and in no manner imperfect on account of the engagement to indorse the bills of lading when they arrived. Such an act would naturally be required, as evidence of the property, and more particularly to entitle the parties to receive the goods from the master of the ship; but it can by no means be considered as the substance of the transfer, or as an essential part of the title of the purchaser. If the bills of lading had been by accident destroyed, could it be supposed that no title could have been made? It is rather the undertaking to do further acts to secure a title than an essential part of the contract of sale. As to the other objection that has been urged against it as a transfer *in transitu*, it is to be remembered that the whole of that class of cases relate to transfers in time of war, by which a new state of things is introduced; and though the contemplation of war has been brought into the argument, there is no case extant in which such a transfer having taken place *before hostilities*, and before the character of enemies property, *had attached*, has been pronounced illegal. The contemplation of war, in this case, was a mere mercantile speculation commencing three months before the war broke out, by which the individual chose to give up a part of his property to secure the rest. If such a transaction is to be brought within the range of rules, which are justified only as rules of war, what limits will in future be assigned to the operation of these rules? In the time of profound peace, war is at all times so far a possible event, that it may
be

be supposed to form a part of all mercantile speculations, and yet no one would say, that the legality of such a speculation could on that ground be called in question. The rule of law has hitherto been applied only to transfers in time of war, which introduces a new state of things for a known and definite period. It is the law *for the time of war*. To apply it to antecedent transactions, would be indefinite in extent, and most vexatious to the free speculations of trade. The shipment, the sale, and detention of this property were all prior to the breaking out of hostilities, and therefore this contract cannot fairly be made subject to any such principle.

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JUDGMENT.

Sir *W. Scott*.—This question arises on parts of several cargoes put on board *Dutch* ships in *January* and *February* 1803, and brought in under the general embargo on *Dutch* property, previous to hostilities, in the month of *May*. The property is documented for the account and risk of certain estates in *Surinam*; and certainly, if it was not allowable under any considerations to aver against the evidence of the ships documents, it must be subject to condemnation as *Dutch* property. But the Court has opened a door to such claims, in opposition to the averment of the ships papers; and it has done this, on a consideration of the fair course of mercantile speculation in time of peace. It has even allowed a change of property *in transitu*, by the (a) transfer of the bills of lading, where

(a) In the *Tida* and *Kingma* and other cases.

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it had been done without any view of accommodation to relieve the feller from the pressure or prospect of war. In the present instance, there is no proof of any transfer of the bills of lading, except as to one or two parcels of goods belonging to the widow Noble, which do indeed bear an endorsement, but whether they were so endorsed before or after the war, it does not appear. This alone would be sufficient to defeat the claim; since, till the bill of lading was so endorsed, the contract would, I apprehend, be a thing remaining in covenant only: It might subject the party to an action *damni dati*, but it would not amount to a transfer, being only an engagement that the goods *should be* transferred when they arrived. That a transfer may take place *in transitu*, has, I have already observed, been decided in two or three cases, where there had been no actual war, nor any prospect of war, mixing itself with the transaction of the parties: But in time of war this is prohibited as a vicious contract; being a fraud on belligerent rights, not only in the particular transaction, but in the great facility which it would necessarily introduce, of evading those rights beyond the possibility of detection. It is a road that, in time of war, must be shut up; for although honest men might be induced to travel it with very innocent intentions, the far greater proportion of those who passed, would use it only for sinister purposes, and with views of fraud on the rights of the Belligerent. This, however, is not a contract made in time of war; and therefore an important question is raised, Whether the *contemplation of war* would have the same effect in vitiating these contracts as actual war? It cannot be said that all engagements in the proximity of

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war, into which the speculation of war might enter, as for instance, with regard to the price, would therefore be invalid. The contemplation of war is undoubtedly to be taken in a more restricted sense. But if the contemplation of war leads immediately to the transfer, and becomes the foundation of a contract, that would not otherwise be entered into on the part of the seller; and this is known to be so done, in the understanding of the purchaser, though on his part there may be other concurrent motives, as in the case of the *Reudsborg*, such a contract cannot be held good, on the same principle that applies to invalidate a transfer *in transitu* in time of actual war. The motive may indeed be difficult to be proved—but that will be the difficulty of particular cases: Supposing the fact to be established, that it is a sale under an admitted necessity, arising from a certain expectation of war; that it is a sale of goods not in the possession of the seller, and in a state where they could not, during war, be legally transferred, on account of the fraud on Belligerent rights;—I cannot but think that the same fraud is committed against the Belligerent, not indeed as an actual Belligerent, but as one who was, in the clear expectation of both the contracting parties, likely to become a Belligerent, before the arrival of the property, which is made the subject of their agreement. The nature of both contracts is identically the same, being equally to protect the property from capture of war—not indeed in either case from capture at the present moment when the contract is made, but from the danger of capture, when it was likely to occur. The object is the same in both instances, to afford a guarantee against the same crisis: In other

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words, both are done for the purpose of eluding a Belligerent right, either present or expected. Both contracts are framed with the same *animo fraudandi*, and are, in my opinion, justly subject to the same rule.

Upon the general ground, also, of guarding against fraud, it appears to me to be equally necessary to apply the same rule to antecedent contracts of this nature. The danger and extent of the mischief to be apprehended is perhaps greater, as it is the only method by which the accumulation of colonial produce could be brought home. It is to be observed also, that the destination is from the colony to the port of the mother country; in which, with the slightest management, a system of protecting the interests of the enemy might be constructed, which no vigilance could detect. I am of opinion, therefore, that if the papers and letters which have been produced, do sufficiently establish the purpose attributed to the contract,—if it is proved to have been built immediately and fundamentally on the contemplation of war, on the part of the seller, and that it would not otherwise have fallen into the hands of the purchaser, it is an illegal contract, and must so be held on every ground, on which similar contracts in time of war have been held to be invalid.

It remains then only to consider the evidence of this fact; though perhaps a preliminary question might not unfairly be raised, which would have excluded all other observations; viz. whether in truth this contract was a *bona fide* transfer. I shall not think it necessary to go through these papers particularly with that view, farther than to observe, that there
are

are passages which do exhibit to my apprehension strong grounds of suspicion that it was not a *bona fide* contract in itself. The claim is given for Mr. *Jonassen* of *Embsden*, who is described to be a person of property, though I do not recollect the name in the various transactions of the last war, which have brought to our notice the names of most houses of extensive credit at *Embsden*. He seems to have been a sole trader; as he appears, from a circular letter exhibited in the evidence, to have just formed a new partnership after the commencement of this transaction. This large purchase was made therefore on his own sole credit. It appears likewise that there is a house of the same name at *Amsterdam*, and that payment was to be made by bills drawn on them. I will not venture to say whether Mr. *Jonassen* had any connection with that house or not, but every body must perceive that such a circumstance would at least afford no inconsiderable facility to cover a transaction of this kind. I observe likewise that this contract stands not only on the sole commercial credit of Mr. *Jonassen*, but on his sole credit, also, in point of veracity, since none of his clerks, nor any other persons associated in the transaction, have been examined. Only one person, a notary-public at *Amsterdam*, attests, "that he perceives by Mr. Green's copy book that *Jonassen's* letters were actually answered; that he inspected the original bills of exchange, and made copies of them." Mr. *Jonassen* states in his affidavit, "that he bought the goods for himself and his partakers, (though it does not appear who these partakers are, nor whether they might not be trustees for the house at *Amsterdam*), that it was a bona fide transaction,

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“ that the bills of exchange were true and *genuine*,
“ and that the letters were really dispatched, and were
“ *genuine and original*.” The magistrates by whom
they are authenticated, *certify*, “ that as they *were ex-*
“ *hibited* to them, and bore the post-mark, they could
“ not *refuse to certify* that they were true and ge-
“ *nuine*.” This is the whole guarantee that is offered
of the actual occurrence of such a transaction, except
the production of the letters themselves. I cannot but
think that this proof would be very insufficient to en-
title the party to restitution. Other persons are stated
to be partakers, though it is not shewn who they were,
nor whether they were even known to Mr. *Jonassen*.
That his affidavit alone should be sufficient to authen-
ticate the whole fairness and reality of this contract,
would be too much to maintain,

It is material, however, to observe the manner in
which the transaction begins. The King’s Message to
Parliament of the 8th of *March*, 1803, could not but
have produced a considerable sensation on the *Continent*.
The first letter that is exhibited is from the owners
in *Holland*, of the 25th *March*, and seems to be
introduced chiefly for the purpose of shewing, that
there had been a commercial connection between the
parties before, though it was reduced to a very lan-
guishing state: To this letter no answer is produced.
The first letter of Mr. *Jonassen* is of the 12th of *April*,
written in answer to one of the 9th, which was an
answer to one of the 1st, written by Mr. *Jonassen*,
though that letter is not produced. It is not impro-
bable, that this letter of the 1st might have thrown
some light on the real character of the contract, as
containing some observations on the necessary steps
to

to be taken, in conducting such a transaction in that critical situation of affairs ; as in Mr. *De Coninck's* case it may be remembered, the first invitation came from him. In the letter of the 9th of *April*, the *Dutch* Owners advert to the uncertain prospect of affairs, and ask, if they can get goods coming from the *Dutch* colonies *neutralized*, by which expression they must I think be understood to point explicitly to a state of war. The answer of Mr. *Jonassen* is material, as it at least shews that the contract took place under an avowed necessity on the part of the *Dutch* owners, arising out of their apprehensions of war. He writes to them in these terms : “ Your apprehensions are just, but “ you must not flatter yourself that it will be sufficient merely *to neutralize the property*. The *English* have shewn, during the late war, that they “ knew how to discern property neutralized from that “ which is really *Prussian*. For my part, I will have “ nothing to do with such transactions, nor do I “ believe, that any respectable house in *Embsen* “ will be found to engage in them.” I hope that this could be no news, that no house of *real dignity* and true credit would engage in such a system of fraud and perjury ; though one hardly sees how the credit of the house was of any consequence, since nothing more was wanted, than a mere neutral name to hang to their goods. He goes on : “ *I cannot serve you.*” On which, I cannot but observe that they had not proposed it to him ; they had merely asked if it could be done at *Embsen*. Then comes something which might perhaps, in its references, be not immaterial : “ If I “ can render myself useful to you *in any other manner*,

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"I shall be happy to serve you." Whether any thing had passed before, I am not authorized to say; but it is not improbable that this might relate to some other proposals which he had held out. In the answer to this letter, the persons in *Holland* write: "We have the greatest satisfaction, in finding that you decline to *neutralize*." I say again, they had never asked him to undertake it; they had only desired to be informed whether it was feasible at his place. Surely such inconsistencies betray strong marks of a correspondence not genuine. The letter goes on—"Since *neutralizing* is not possible, could not the goods be sold at your place after shipment, to secure us against a total loss?" Can there be a more explicit declaration, that the seller was led to enter into this transaction, only as an expedient to save his goods from the danger of war, which he considered as imminent and certain. This letter was written on the 9th of *April*, and was received on the 12th, and on the very day of the receipt does Mr. *Jonassen* take on himself this large contract, or if there were other partakers, who do not appear, it would not be less extraordinary, that with so short a time for deliberation with them, Mr. *Jonassen* should take on himself the responsibility as the principal at least, and as the only person who appears to have been known to the sellers in this transaction. The next letter is from *Amsterdam*, and mentions advices received of the shipments from *Surinam*. It adverts again to the prospect of public affairs, and says, "As no reliance can be placed on our underwriters." There was an end of insurance, then, that is obvious; the owners were insured against *sea risk*, but not against the chance of war—against that there was no one to be

be found who would insure them. They then proceed—"these circumstances alone induce us to accede to your proposal," and mention is made "that Mrs. Noble would be glad to enter into the same engagement." This letter was received on the 3d of May, as it appears from the endorsement. On the very same day Mr. Jonassen answers it, professing his willingness to engage in the contract. The next letter from *Amsterdam*, of the 7th of May, mentions, that as this is a business which requires dispatch, our partner, Mr. R——, will proceed to your place to terminate the business with you. At this time Mr. R—— had not set out. On the 10th of May, Mr. Jonassen writes in answer to the letter of the 7th, giving notice of Mr. R——'s arrival, and states that they had already been treating, but had not come to any agreement. On the same day, Mr. R—— writes to his partners in *Holland*, "that there was no time to be lost, that Mr. Jonassen was very tenacious;" yet, strange as it will appear, the contract was drawn up in all its forms, bearing date on this very day, when both parties represent themselves to be still treating, but at variance in their terms. I cannot say that all this may not possibly have taken place as it is represented, but added to the other features of the case, such an apparent precipitation in the most material part of the negotiation does, I think, very considerably heighten the improbability of the transaction. There are many other passages on which similar observations might be made unfavourable to the reality of the contract: There are still more that might be produced to shew the repeated acknowledgment of the parties, that nothing else than an absolute necessity arising from approaching hostilities

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ties could have induced the *Dutch* owner to sell. "They are congratulated on *having saved a part of* "their property." In short, it would be only to consume time unanessarily, if I were to particularize all the passages that tend to establish to a demonstration, that the contract was made only as an expedient for avoiding the consequences of war, which both parties considered as inevitable. This is sufficient to support the principle which I have ventured to lay down, that the same rule of law is to be applied to such contracts *in transitu*, made in anticipation of war, as are applied to similar contracts in time of actual hostilities. I have already adverted to some unfavourable observations that might be made, as to the reality of the transaction. On that part of the case it might also be farther observed, that the property was to have gone into the hands of the seller, where the whole agreement might have been rescinded ; that this circumstance would very much facilitate the cover of fraud ; at the same time that it does, perhaps, throw some degree of improbability on the transaction, that a foreign merchant should engage in so large a purchase with persons, who were, nevertheless, to take the actual possession of the goods, though he appears to have had but very slender dealings with them before. The letter which opens the transaction is not produced, and there are many other things which might induce me to suspect that it is not a real and genuine transfer. But taking it to be a *bona fide* contract, yet being formed *in transitu*, for the purpose of withdrawing the property from capture, it does intimately partake of the nature of those contracts, which have, in the repeated decisions of this, and of the Supreme Court, been pronounced null and invalid ; and I pronounce this property subject to condemnation.

JUFFROW CATHARINA, HANSEN.

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THIS was a case respecting the due application of a licence, for the importation of certain raw materials from *France*, viz. whether a parcel of lace could be held to come under that description.

Licence—for
raw materials—
Lace not pro-
perly included—
Favourable con-
siderations
arising from the
situation of the
parties and the
circumstance of
the orders having
been given pre-
vious to the war
without an op-
portunity of
countermanding.
— Restitution.

JUDGMENT.

Sir *W. Scott*.—This lace was shipped under an order given before hostilities; and it is argued on the part of the captors, that lace is an article which cannot be included under the terms *raw materials*; that no protection can be derived from the licence, and that the original order ought to have been countermanded at the breaking out of the war. Certainly if a licence is to be deemed necessary, it will be difficult to say that the particular licence alluded to in the present case can avail to the protection of this shipment. But there are some considerations applying to the manner in which this shipment had originated, which may entitle it to more indulgence. It appears that goods were sent out from this country to *Flanders*, and that an order was given at the same time for a return of certain other foreign articles, and among the rest for this lace. It seems, that when an order is given for lace, it is put into a state of preparation, and that more time is required to countermand an order for this article than for others on which less labour and preparation is required: It is a work of long and slow process, in which advances must be made to the manufacturers; and although the demand on that account against the merchant would be suspended during hostilities, it
might

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might be difficult to relieve the *British* merchant from the demand, when the foreign correspondent was re-habilitated, and restored to his right of action by the return of peace. It is to be remembered also, that during the present hostilities there has been a more than ordinary difficulty in carrying on any correspondence with the enemy's countries—a circumstance for which the Court has in other cases thought it not unreasonable to make some allowance. It does not appear that the party had an opportunity of countermanding; and although it would have been more satisfactory, and a more guarded proceeding on the part of the *British* merchant, to have applied for a licence for the special importation of this article under the circumstances of his case, there are sufficient considerations to induce the Court to think favourably of this claim. There seems to have been no intention to dissemble: it was owing to the erroneous conception of the enemy's shipper, that this article was put on board to take the benefit of a licence that had been procured for other articles in this vessel. It is therefore in this point of view distinguishable from Mr. *Hankey's* case, in which the shipment was made here, where the party had still the dominion over the goods, and the power to stop them from proceeding. Here the dominion was in the enemy's shipper, under a discretion reposed in him by orders before the war, and which the importer is not shewn to have had any opportunity of countermanding. I wish it to be understood, that by this decree the necessity of obtaining a licence, is not in any degree relaxed. On the contrary, this Court cannot sufficiently inculcate the duty of applying, in all cases, for the protection of a licence, where
property

property is to be withdrawn from the country of the enemy: it is indeed the only safe way in which parties can proceed. Without meaning in the least to weaken the force of this obligation, I think the claim, under the particular circumstances of this case, is justly entitled to the favourable considerations which I have thrown out, and I shall direct this property to be restored.

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JUFFROW
CATHARINA.

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1804.

THE WILHELMSBERG, LUBBEN.

Mar. 16th,
1804.

THIS was a question of costs and damages, owing to the neglect of the captor not bringing the vessel into what could be reasonably termed a *convenient port*, under the Prize Act.

Convenient port, under the Prize Act, how considered, as to the liberty of captors to choose the ports to which they bring vessels for adjudication.

JUDGMENT.

Sir W. Scott.—This ship was seized on a voyage from *Amsterdam* to *Archangel*, under a suspicion, I presume, of *Dutch* property. She was going in ballast to bring a cargo to *Amsterdam*, and appears to have been very much in the habit of *Dutch* trade, particularly during the war. On these and other grounds, it could not be fairly denied that there were circumstances to justify the seizure: but the second act of sending the vessel to such a place as *Shetland*, is not so defensible. The Prize Act undoubtedly gives the captor some latitude on this subject; he is directed generally “to send his prize to some convenient port.” *Shetland* cannot, I think, be considered in any manner

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ner as *such a port*. It is a place where the captor cannot get advice; much less can the claimant learn in what manner to proceed, or where to resort for justice. The captor is certainly not justified under the Prize Act to select *any* port that he pleases. It must be a *convenient* port, and in that consideration the convenience of the claimant, in proceeding to adjudication, is among one of the first things to which the attention of the captor ought to be addressed. If the vessel had been sent, in the first instance, to *Leith*, or *Berwick*, or to any of the principal northern ports of this kingdom, the consequences that have arisen in this case could not have ensued. The papers were brought in on the 2d of *August*, but nothing more was done till the 16th.—In the mean time, the vessel was removed to *Leith*, and on the 23d of *August* an offer was made to release. Surely it cannot be maintained, that no damage had accrued at this time, when the offer was made. The master swears, that he could not obtain his papers, and that it was too late in the year to prosecute his voyage to *Archangel*. The offer it seems was rejected, on this account, and because there was no reservation of costs and damages, which might, very prudently, and in most cases very safely be made. I cannot think that the neutral master acted in any manner improperly, in declining such an offer, being only told, to go about his business, and that he would hear no more of the matter. To release a vessel in this summary manner, without her consent, after she was once brought in, would be contrary to the directions of the Prize Act. Upon the whole, considering that the Court is called upon to beat down and discourage the notion that captors may carry their prize wherever they

they please, and that the injury sustained in this case has proceeded entirely from that mistake, I shall allow one month's demurrage, and the expences of the present hearing.

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BERG.

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1804.

THE DRIVER, CASHMAN.

April 17 & 25th,
1804.

THIS was one of the *Cape Nicola Mole* cases, and now came on upon objection taken to the report of the Registrar and Merchants, viz. that in estimating costs and damages, they had allowed interest upon interest.

Registrar's report confirmed as to Interest upon interest on an account settled by the report of the registrar and merchants two years before.—Expences of poundage in cases of costs and damages not chargeable to the claimants.

The Registrar said—That they did not usually allow interest upon interest, but that the ground of the present report was, that the account had been made up two years ago, and that from that time they had allowed interest.

JUDGMENT.

Sir *W. Scott*.—This is one of that unfortunate class of cases from *Cape Nicola Mole*, in which this Court has felt itself under the necessity of decreeing restitution with costs and damages. The report of the Registrar and Merchants was made, and if not objected to, it was to be taken as confirmed. No objection has been taken, and therefore it must stand confirmed. Some short time is, I presume, usually allowed for payment; but here the matter has been suspended for a considerable time, owing, as I am informed, to an appeal that was entered on the part of the captor. The usual rule undoubtedly is not to give interest on

The Haldah.
Supra, vol. 3.
p. 235. and
other cases.

The
DRIVER.
April 17 & 25th,
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interest, but when interest has been given, and the account is made up, the interest then becomes principal, on which it is not unreasonable that farther interest may be decreed, similar to what is done in the Court of Chancery. Some time is to be allowed for the convenience of payment: for that, and for the confirmation of the Registrar's report, I shall allow a deduction of two months, and confirm the report as to interest given from two months after the report was brought in by the Registrar (a).

April 20th,
1804.

THE BRIG LOUIS.

Prize agents
subject to the
order of the
Prize Court for
interest of money
detained in their
hands.

THIS was one of the *Cape Nicola Mole* cases, in which a motion was made on the part of Messrs. *Willis and Waterhouse*, as agents of the captor, that they might be dismissed, on a statement that they had given a bill for the amount of the money in their hands, and that the bills had been paid.

Contra Laurence prayed—That the Court would decree them to pay interest, and the costs of the proceeding.

(a) In this case, on a former day, (13th March 1804), the Registrar had asked by whom the expence of poundage was to be borne, whether by the claimant or the captor, under a decree of costs and damages? *Court*.—I think a party having a decree for costs and damages, is to be protected against the expence of poundage. An express decree of costs and damages, must go to every thing in the way of compensation. So in other cases, that are not cases of costs and damages, but where the captors are the persons suing out the commission, the poundage is paid by them.

Swabey,

Swabey, in reply.—The captors may be liable to interest, but how far their agents can be held liable in this Court, is a question now depending in prohibition (*a*) before the Court of King's Bench, on an order to that effect made on these parties in the Court of Appeal. It is prayed therefore that this question may stand over.

The
BRIE LOUIS.

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Court.—It will be understood that, if the Court before which the prohibition is depending, shall hold that agents are properly liable to interest, under the decree of the Prize Court, I shall hold that liability to attach on *Willis* and *Waterhouse* in the present case. It would be the greatest hardship on the captors, to throw the demand for interest on them, when the agents have all the time had the use of the money, merely because it has happened that the monition was first taken out against the captors (*b*). As to the expenses, they have been incurred principally by the indulgence that has been shewn to these agents, for the accommodation of their affairs, and they must fall on them.

(*a*) In the case alluded to (the *Polly, Davis*), the Court of Appeal had made a decree of interest against the agents. On prohibition brought in the Court of King's Bench, That Court held, that the jurisdiction of the Prize Court exercised over the Proceeds and over the agents, who had been in possession of those proceeds, was well founded. *Willis against the Commissioners of Appeal in Prize Causes, Easter Term, 1804. East. Rep.*

(*b*) In the case of the *Polly*, the first decree of the Lords of Appeal for interest was against the captors.

May 1st,
1804.

THE URANIA, WALKER.

Allegation
pleading affidavits, in a case of
joint capture by
plea and proof,
rejected.

THIS was a case, on the admission of an allegation of joint re-capture, on the part of the King's ship, pleading the affidavits of some *French* sailors who were on board the recaptured ship. The recapture was made by a non-commissioned vessel, and proceedings were first instituted on the part of the Admiralty, *as for droits* of Admiralty, but were discontinued. The *Loyal Briton* afterwards appeared demanding salvage in her own right.

In support of the allegation, the King's Advocate and Arnold.—The first point, which appears one of considerable importance, is whether the non-commissioned vessel has any *persona standi* before the Court. In the case of an original capture, she could not maintain an interest in prize. In recapture also, which partakes intimately of the nature of prize, the same principle seems equally to bar *the* non-commissioned person from maintaining a suit for salvage; and, it is presumed, that no instance can be produced, in which such an interest has been pronounced for.

Court.—Surely a distinction has been always held in cases of salvage. There must be many cases in which the claims of non-commissioned persons have been allowed for salvage, on retaking property out of the hands of the enemy. The words of the Prize Act (a), appear to me clearly to recognise such a practice; which direct salvage to be paid on recapture *by his Majesty's ships of war, or any privateer, or other ship or vessel or boat under his Majesty's protection and obedience.*—Objection over-ruled.

(a) Sect. 39.

The

The King's Advocate.—A second question turns upon the form of proceeding. The claim for salvage was first instituted on the part of the Admiralty by affidavits, and at that time the joint captor prepared himself in the same way, by taking the affidavits which are now offered. The Proctor of the Admiralty declined to proceed farther; and the non-commissioned captors have commenced a suit, on their own behalf, by plea and proof. To this the joint captor has nothing to oppose but these affidavits, as the *French* crew have all left the kingdom. Whilst the cause was first proceeding in the form of affidavits, the joint captors were justified in relying on these affidavits, as sufficient evidence. It is hoped therefore that the Court will, under the particular circumstances of the case, think them still admissible, and allow them to be pleaded in this allegation.

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URANIA.

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On the other side, Laurence.—Whilst it was uncertain whether some part of the cargo might not be Droits of Admiralty, the Proctor of the Admiralty gave an appearance, and took one or two affidavits, but soon declared that he proceeded no farther. We are called upon to propound our interest, and in doing that, are in no manner bound by the mode in which the Proctor for the Admiralty had proceeded. The cause must go on in the regular way. These voluntary affidavits cannot be received.

JUDGMENT.

Sir. *W. Scott.*—There is a fact pleaded in this allegation, which, if I understand it rightly, may be very material. It is stated, “that when the *Glenmore*

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(a) Sect. 41.

took possession, there was no *British* seaman on board, except the first and second mate of the *Loyal Briton*, who delivered the papers to the officers of the *Glenmore*, with an intimation that the *British Register* was on board the *Loyal Briton*." If that is a true representation, there could be no want of evidence; as these mates might be examined. With regard to the nature of the capture, also, it is to be observed, that if the *Register* was produced, there could be no want of evidence that this was a *British* ship. She was brought into *Cork*, and there the salvage was settled, and the vessel was permitted to proceed on her original destination, under the provisions of the Prize Act (a). It was known then that this was a re-capture, and that there was a private non-commissioned vessel, asserting to be the sole recaptor, because the Proctor of the Admiralty appeared so soon as 28th July 1801, alledging it to be a *sole recapture* by the *Loyal Briton*. Why it was made a case of Droits, I cannot see, because, according to all the ideas which I have been taught to entertain on the subject, the non-commissioned vessel was fully competent to assert an interest in salvage; and this, in my opinion, is fully confirmed by the words of the Prize Act. Then the whole case is resolved into this question: Whether the *Loyal Briton* was the sole recaptor or not? and this is a question which cannot be permitted to be settled by affidavits. If there is any defect of evidence, it has been produced by the neglect of the parties; but it does not appear to me that there must necessarily be any such defect, as the mates of the *Loyal Briton* may be examined.

Articles of the allegation pleading the affidavits rejected.

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THE PRIMA VERA.

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IN this case a monition had been taken out against the Deputy Registrar of the Vice-Admiralty Court of *Martinique*, to bring in certain proceeds. In answer to the monition, it was now stated in his affidavit, "that the money had been by him remitted to the house of *Forbes* and Co. in *London*, to be deposited in the Bank by the direction of the Principal Registrar, and that he verily believes that it was received and invested."

Monition directed to issue against the Principal Registrar, to pay in proceeds, suspended, on shewing that he had remitted the money to a particular house in *London*, by the order and direction of the Principal Registrar.

The King's Advocate contended—That the return was insufficient; that the parties had a right to look to the Deputy Registrar, who was the ostensible person in the execution of the office, and received considerable emoluments from it; and prayed that the Court would enforce the demand, by granting an attachment against him.

The Court asked why the monition had not been taken out against the principal.

The King's Advocate said—That this Gentleman was the ostensible person, and that the principal was abroad.

The Court.—As the question is, Whether the Principal or the Deputy Registrar shall be made the responsible person, I should be unwilling to determine such a point, especially by taking the party into custody, without farther consideration.

On a subsequent day, *May* the 16th, the Court declined to grant the attachment, or to dismiss the party, but directed a monition to issue against the principal Registrar.

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THE ZACHEMAN, KRAEPLIEN.

Swedish Treaty.
—Detention of a
Swedish ship
brought in sub-
ject to the right
of pre-emption of
a cargo of tar.—
Three weeks de-
tention allowed,
and directed to
be paid by Go-
vernment.

THIS was a case on the detention of a *Swedish* ship, with a cargo of iron and 1200 barrels of tar, taken on a voyage from a *Swedish* port to *Rochefort*.

The King's Advocate stated—That the ship had been offered to be restored; that the cargo being tar, consigned to a port of the enemy, had been detained for pre-emption; but that the offer was at last declined on the part of Government.

On the part of the Claimant, Laurence stated—That the vessel had been taken so long ago as *March*; that compensation was due for the detention under the second and third articles of the late convention with *Sweden*.

In reply, the King's Advocate and Robinson.—The captor in this case has done nothing but what was perfectly justifiable. To detain and send in a cargo of tar, bound to such a port as *Rochefort*, was an act of duty, which he was not at liberty to omit. The very Treaty (a) referred to, seems to indemnify the captor in this instance, by the distinctions made in the second and third articles, between cargoes of this kind bound to neutral ports, and those going to the port of the enemy. In the former case it is provided, “that if a cargo bound to a neutral port is brought in, on suspicion of a destination to the port of an enemy, and it afterwards appears that the destination was actually to the neutral port, she shall be restored with compensation, &c.” that is,

(a) 20th July,
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as against the captor. In the next article, the case of such cargoes bound to the port of the enemy, is provided for. It is there considered as a case of *pre-emption*, in the exercise of which, *the bringing in* must be justified as a preparatory step, and if any delay takes place, it is obviously not to be imputed to the captor, who is by that very article of the Convention virtually authorized to bring in such a cargo.

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JUDGMENT.

Sir *W. Scott*.—I have no hesitation in pronouncing that the seizure in this case was perfectly justifiable. In the case of a ship carrying such a cargo as tar to one of the great naval arsenals of the enemy, it was not improper to bring in for enquiry as to the fact of property, whether it was going on the private account of the neutral merchant, or under a contract with the Government, by which those arsenals are more usually supplied. The captor had therefore a perfect right to have the formal papers verified. In bringing in and taking the depositions, the captors were in my opinion perfectly justifiable. That being done, the effect of this evidence ought to have induced them to consent to restitution.—Then comes the question of pre-emption. In the Convention lately entered into, this Country has been induced to waive its former right of forfeiture, for that of pre-emption, which *Sweden* has admitted, and I think in terms which do warrant the construction put upon them, in argument, that they justify the bringing in. As to the exercise of the right of pre-emption, if particular orders from Government are necessary, I ap-

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prehend, that there is some mode in which those orders can be expeditiously obtained. The terms of the Treaty seem to relate principally to the time taken in unlivery; but if the ship is detained as a warehouse, under any uncertainty as to the intention of Government, the equity of the Treaty will, I think, extend also to such detention. The ship was brought in on the 20th of *March*, the claim was given on the 27th, and on the 3rd, the offer of restitution was made. Since that time, there seems to have been some delay. In the present case, which is perhaps the first that has arisen under the Treaty, and one of not the most favourable complexion, I should be unwilling to press these considerations to the utmost; but I wish it to be understood that cases of this description must be conducted with great tenderness to the neutral interest, and that as little time as possible must be lost in deliberation. Some demurrage must be allowed, but not against the captors in this case. I shall allow three weeks demurrage to be paid by His Majesty's Government; and I wish that the Admiralty may be apprized, that under the Treaty which now exists, matters of this kind must not be kept subject to long negotiation, since it is not less expedient for the purposes of justice, than for the interests of all parties concerned, that a prompt answer should be returned, as to the disposition of Government to avail itself of the right of pre-emption.

THE SISTERS.

(Instance Court.)

May 11th,
1854.

THIS was a case (a) of possession, brought by Mr. *Charnock* against *Tubbs*, the asserted owner in possession, under a transfer from *Marsden* and Company, for whom it was suggested that *Charnock* had made the original purchase.

Case of possession—Legal title still remaining in *Charnock*, in the possession of the bill of sale, supported in opposition to an asserted equitable interest in others.

On the part of Mr. Charnock, the King's Advocate.
—Several transfers are asserted to have taken place with regard to this ship. In the first instance, Mr. *Charnock* was the undoubted purchaser, under a sale by the Marshal of this Court. He paid the purchase money, and obtained a bill of sale, which establishes the legal title in him, unless it can be shewn to have afterwards passed from him by any legal transfer. The plea set up on the other side is, that *Charnock* made this purchase as agent for *Kirkpatrick*, and actually delivered possession to him; that *Kirkpatrick* afterwards sold to *Marsden*, and *Marsden* to *Tubbs* the defendant in this suit. The parties are many of them become bankrupts, and the whole of these subsequent transfers seem to have passed by accommodation bills, and merely to give this vessel the colourable character of an *American* vessel, to enable her to engage in some course of trade, in which she could not legally be employed as an *English* vessel. The case on behalf of Mr. *Charnock* is, that he is the holder of the legal title in the bill of sale; that in sending the vessel to *Kirkpatrick* at *Liverpool*, he meant to transfer her only provisionally, in case the

(a) *Supra*, vol. 4. p. 275.

purchase

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purchase money should be repaid ; that he detained the bill of sale, to await this contingency ; that condition never having been fulfilled, nor the transfer completed, by executing a bill of sale to *Kirkpatrick*, the legal title is still in *Charnock*, he is entitled to be put into possession of his vessel by the decree of this Court.

On the other side, Arnold and Laurence.—This is a cause of possession, in which the Court will look to the right of possession, having no jurisdiction over the question of property. It will not disturb a quiet possession without a clear title is made out on the other side; still less will it do this, where the person now claiming to be put into possession was the very person who gave possession to him, who now holds it; and where the bill of sale was retained only from a suggestion of general convenience put forward by himself. The equitable title has undoubtedly passed from *Charnock*, and the only question is, Whether, after a voluntary agreement on his part to sell, accompanied with delivery to the agent of *Kirkpatrick*, he can now set aside the whole of that transaction, and demand the aid of the Court, to give back the possession to him, after other contracts have been engrafted on that equitable title, which *Kirkpatrick* the purchaser under the first sale had acquired from him. The Statute Law of this kingdom directs that the transfer of *British* ships should pass between *British* subjects, by certain formal instruments. But that is to be regarded as a strictness, arising from the peculiar policy of the navigation system of this country. This was an *American* bottom, and it is by no means clear that the strict rule of our Statute Law would attach upon it. In countries where a bill of sale might not be necessary, the legal title could not be outstanding in opposition to the equitable

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equitable title that has passed under this transaction. But independent of that circumstance the Court is not bound to lend its aid, to dispossess a party who appears, upon the face of the transaction, to have been invested with his equitable title, by the very person now setting up a claim against him. A great part of the purchase money was actually paid specifically on account of this purchase; but now, because *Kirkpatrick* is become a bankrupt, and it suits the purposes of *Charnock* better to make his claim to the ship, than to come in as a general creditor under the commission, it is pretended that that payment was made to the general account. There has been, not only a distinct *agreement to sell, but also a specific payment, and delivery to Tubbs*, with intimation from *Kirkpatrick* at the time, that he had agreed to sell the ship to *Marsden*, and that *Tubbs* would come to take possession of the ship for the purposes of that sale. *Tubbs* accordingly came, and received delivery of the vessel, without any intimation from *Charnock* that *he* had any right in the vessel, it being merely stated, that it would be more convenient not to give up the bill of sale, for fear of vacating a policy of insurance that had been made upon her. This being the state of the facts, the Court will not think it necessary to interfere, but will leave the parties to their remedy in other Courts where the whole question of property may be brought into discussion.

In reply, the King's Advocate.—In a transaction of this kind, no transfer by parol agreement could avail to confer a legal title. But in this case it does not appear that any absolute agreement was made; nor any delivery of such a nature, as is contended for on the other side. On the 23d of *August*, *Charnock* complains of the amount of the advances made to
Kirkpatrick's

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Kirkpatrick's account, and on the 30th of *August*, it appears that *Kirkpatrick* considered the ship as *Charnock's* security, since he wrote "that he could not transfer her, till *Charnock* had transferred to him."

Kirkpatrick contracts for a sale to *Marsden* and *Charnock* permitted the vessel to go round to *Liverpool*, that he might obtain payment of the purchase money. But the sale to *Marsden* never actually took place, and the money never was in reality refunded to *Charnock*. Here is therefore no absolute agreement even by parol, nor any absolute delivery, if those acts alone could avail.

JUDGMENT.

Sir *W. Scott*.—This question arises on the arrest of a ship, which had been sold under the authority of this Court to Mr. *Charnock*. He is in possession of the bill of sale, and this Court is called upon to maintain a title acquired under its own proceedings. Whether *Charnock* purchased as a trustee for another, or under what private understanding, it will be unnecessary to enquire. The legal interest, which is established before the Court, on his part, excludes all considerations of other equitable titles, which, if they exist, must be left to be enforced in other Courts. Much correspondence has been introduced, and if it was fit for me to enter into it, I should see that *Charnock* was employed to buy this vessel for a Mr. *Kirkpatrick*, when the accounts should be closed between them; but till that money was repaid, *Charnock* was to continue the equitable owner, as he certainly was the legal proprietor under the bill of sale that had been executed to him. It has been contended in argument, that the effect of the bill of sale alone would not be material, because this was a foreign ship (a), in respect to which it might not be requisite that it should pass by a bill of sale. It is said, that

(a) An American bottom, sold under a decree of Court, in a cause of bottomree. 21st July 1800.

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that the agreement to be found in these letters, and the actual delivery under it, would be sufficient to establish the equitable title; and a reference has been made, on this subject, to some opinions at common law, which are said to have been given in favour of such a title. The opinions of Gentlemen at that bar must undoubtedly be entitled to entire respect on a question of Municipal Law: But this is a question of a more general nature, arising out of a system of more general law—out of the universal maritime law, which constitutes a part of the professional learning of this Court and its Practicers. According to the ideas which I have always entertained on this question, a bill of sale is the proper title to which the Maritime Courts of all Countries would look. It is the universal instrument of transfer of ships in the usage of all maritime countries; and in no degree a peculiar title deed or conveyance known only to the law of *England*. It is what the Maritime Law expects, what the Court of Admiralty would in its ordinary practice always require, and what the Legislature of this country has now made absolutely necessary, with regard to *British* subjects, by the regulations of the Statute Law. As to the fact of such an agreement, what is there in this correspondence that can amount to a precise and particular declaration from *Charnock*, that *he has transferred*.—There are expressions which intimate that he purchased under an intention to transfer, when the account should be settled; but that there was any specific *declaration of having transferred*, is what the Court has not been able to find in this correspondence. Then as to the delivery, it is said that *Charnock* delivered to a person sent by *Kirkpatrick* to take possession for the purpose of proceeding to a second sale. It may be so, but it was not a delivery

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of the title of property—he retains the legal title in his own possession, and gives up the vessel only as the more convenient method of carrying the general intentions respecting her into effect. The expressions of *Charnock's* letters, fairly interpreted, imply that he considered the property to be still in him, till after her arrival at *Liverpool*. If *Kirkpatrick* had intended to purchase of *Charnock*, for the purpose of selling to another, why did he not get a bill of sale executed from *Charnock*, which was the first step to be taken? Nothing of the kind is attempted, but *Charnock* is left in possession of the only legal title, without any assignment. The ship is afterwards turned over in some way or other to *Marsden*, and from him to *Tubbs*, who is represented to have been the person employed by *Kirkpatrick* to receive delivery from *Charnock*. But whilst *Charnock* was left in possession of the bill of sale, such a delivery as is here said to have taken place, could not be a delivery of the title to the property. It was merely putting the property into the hands of another, for the purpose of executing a particular contract, but which contract was, in fact, never executed. Nothing less than an express declaration made by *Charnock* to *Tubbs*, “ I deliver this to you for the use of *Marsden*,” could fairly raise the argument,—how far delivery, coupled with the correspondence, could be held equivalent to a bill of sale. Here is nothing of the kind. Bound down as this Court is to decide on the legal title, without taking notice of equitable claims, I have no hesitation in decreeing the necessary monition in this case, to put *Charnock* into the possession of this vessel.

THE VROW ANNA CATHARINA, MAHTS.

May 15th,
1804.

THIS was a case respecting considerable parcels of *Batavian* produce, captured on a voyage to *Holland*; but claimed on behalf of merchants of *Embden*, under a sub-contract with *Voute and Co. of Amsterdam*, who had purchased of the *Dutch East India Company*, under particular conditions and limitations noticed, in the case.

Contract of certain neutral merchants for *Batavian* produce, to be brought to Amsterdam, and there sold, by the *East India Company*, before the war, pronounced not invalid.

On the part of the Captors, *Arnold and Swabey* contended, in substance, that the transfer itself was not complete, but if it were, that the circumstances under which this property was taken, were sufficient to impress upon it the *Dutch* character. That, in this respect, the case was similar in principle to other cases, to the *Dutch* fishing vessels, (a) and to the *Spanish* register ships, (b) in which it had been established, that a character different from that of the neutral proprietor, may attach on a particular course of commerce, or on a particular transaction, by its intimate connexion with the commercial system of the other country—and in some of the Register Ships, (c) that it was not necessary to produce this effect, that the transaction should arise wholly in time of war. The present case was however founded on a contract made after preliminaries indeed, but not in time of peace nor without a prospect of the renewal of hostilities. The property was documented as *Dutch property*, having been purchased free of duties, and being, in its destination, to become subservient to *Dutch* interests throughout the whole transaction. It was to be consigned to the original sellers, the *Dutch East India Company*; it was to be deposited in their warehouses, and sold at their sales. If the proceeds were to be remitted to the asserted foreign purchasers,

(a) 1 Adm. Rep. p. 1.
(b) In the war of 1739, *infra*, p. 167.

(c) *Marquis d'Antin*, Lords, 5th June 1748, in the claim of *English* Merchants for proceeds of goods sent to *Spain* for the *Spanish West India* trade before the War.

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it was not as an absolute sale, so much as in the nature of a return on *respondentia* for money advanced to relieve the distresses of the *Dutch* Company, and for bearing the risk *in transitu*. That it was impossible to find any feature of an independent title to the thing itself, in such a contract; that at all events the *Dutch* character must be held to attach upon it.

On the part of the Claimants, the King's Advocate and Laurence, contended that the national character of the proprietor was the ordinary test by which moveable property was characterized. That this was the general rule, not yet narrowed by any limitations that could include the present case. That all considerations arising from an unneutral interference *in time* of war were to be put out of the question, as this contract was formed before the present war, and wholly in contemplation of peace. That the case of the *Ospray* (a) in which *American* merchants obtained a restitution of their shares of a *French* whaling voyage, entered *before the war*; the case of *Hafum* and *Ernst* (b), and the cases of the *Swiss* proprietors who obtained restitution of cargoes from *Curacao*, documented as *Dutch*, were instances of the general rule. That the case of the *Dutch* fishing vessels stood on the particular ground of being designed evidently to defeat the rights of war. That the cases of the *Spanish* register ships stood in part on a principle at that time more strictly enforced, that in no case could the proprietor be permitted to aver against the solemn documents of the ships papers; and secondly, in no slight degree, on the particular nature of that trade, of which it was a fundamental principle that the property should belong to *Spanish* merchants, and that that fact should be verified under the sanction of an oath. That the interference

(a) *Supra*, p. 8

(b) *Supra*, vol. 1.
p. 14.

interference of foreigners was prohibited by the policy of the *Spanish* Government, but that no such prohibition could be shewn in this case; on the contrary it was certified by the *Dutch* Company, that they had been in treaty with foreigners but that the negociation had broken off. As to the particular circumstances of the case, it was contended in substance, that they were not such as could impeach the right of property, or fix upon it the national character of *Holland*.

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JUDGMENT:

Sir *W. Scott*.—These are cases of great extent as to value, but not so as to the number of questions involved in them: for the facts are not contested, and the whole inquiry that results out of a very large mass of papers turns upon two questions of law. The general fact out of which these questions arise, is a contract of sale from the *Dutch Asiatic* Company of a quantity of goods lying at *Batavia* to certain persons in *Holland*, who have contracted to undersell to certain other persons resident in foreign countries, who are the claimants and asserted proprietors. To entitle them to receive restitution, it must appear that they *are* proprietors, and secondly, that they *are qualified proprietors*; that is, that they are persons who are not disabled by any circumstances belonging to this transaction, from receiving restitution of their property in this Court. These, are the two questions. In order to determine upon them, the nature of the original contract, between the *Dutch Asiatic* Company, and the first purchasers, must be first considered. That contract appears to have been entered into on the 24th of *March*, 1802, between *Voute* and Co. acting for themselves and divers other merchants of the commercial cities of *Holland*. These parties are considered as actual proprietors, and are so described

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throughout. Under this contract "they are to provide ships, and send them to *Batavia*. They are there to receive the goods, and to pay the price—one third in *Europe*, one third on delivery at *Batavia*, and the remaining third on the return to *Holland*, where the goods were to be deposited in the warehouses of the Company, and sold by the Company, under the usual conditions of their sales." The first question that has been raised, is, whether These Persons are to be considered as proprietors? But on what ground is it asserted that they are not? Is it to be objected, that they had not paid the whole purchase money? That is an objection which every day's habits of considering such subjects will not support; two thirds had actually been paid, and the remaining third was to be received, according to the contract, on the arrival of the goods in *Europe*; that is a sufficient legal payment. It is next contended that there was no delivery! How does that stand in point of fact? The goods had actually been delivered to their agents, and were coming *for their account and risque*. It is true that they are, by the contract, to be delivered to the *Asiatic Company*; but upon what authority? by the contract of the party that it shall be so. In what capacity are the Company to act in their sales? in the capacity of agents. It is not a delivery to the Company, that the Company may do what they please with the goods. They are bound to sell them upon the terms prescribed, and to pay over the proceeds. Does this deprive the owner of the dominion over his goods, so as to destroy his right of property? If I, having goods, hand them over to another to sell, the circumstance of the man's having been the original proprietor of the goods would make no difference. He had conveyed his right of property, and it would be no derogation of those rights, that by the terms of the purchase

purchase he was to have the management of the sale. There would be no foundation for the assertion that the goods themselves were not completely delivered, merely because they reverted to their former proprietor in a new character. His possession, as agent, is my possession. In the present case, it is hardly necessary to observe, that at the time of capture the goods were in the possession of the purchasers: they had not yet reverted. The obligation to revert, founded on a mere voluntary compact, would not defeat that immediate possession, if personal possession could be held necessary to support the right of property; but it is by no means necessary: Suppose the case of the *East India* Company holding a delegated and confided possession of goods in this country, for the purpose of bringing them to their regular sales! Could it be said of such goods, that the contract under which they may have been acquired by the proprietor, subject to this condition, was a contract for the profits only, and not for the goods themselves? Is it necessary that there should be a manual possession by the hands of the purchaser himself? Is there not a legal delivery, an implied delivery, a presumed delivery through the hands of the agent? This is the ordinary mode of effecting the *traditio*; and whether it is given to the same person accepting the office of agent, or to a third person accepting it, still it does not interfere with the *emptio* and *venditio*. In these first purchasers then, there was a clear right of property; and if they, not being restricted from conveying it by contract, transfer it to others capable of receiving it, it will equally be property in them: for what more stands in the way of *their* rights of property? If *Vaute* had all the rights of property; and the want of payment, and the want of delivery, is no objection against him, neither will it be an objection against them, if

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he has transferred to them all those rights, having a legal faculty so to do. If the right of the second purchasers is called in question, it must be said, either that the first purchasers were incapable of selling with effect, or that these second purchasers were incapable of buying with effect. As to any limitation upon the power of transferring, the contract appears to contain no such condition. *Voute* contracts, in the first instance, for his own house and for other *Dutchmen*; that is the first class of contractors, with whom alone the Company negotiate. But there is no express negative to an under-sale to others of any description whatever. There is no limitation to the power of assignment. It does not at all follow, by any just implication, that the contract of assignment between the *first* and *second purchasers* is not good, merely because it might not be obligatory between the original sellers and the second purchasers. The second purchasers may not have a right to come immediately upon the first sellers, and yet the assignment to them be perfectly valid, as far as the title to property is considered here. There are many cases too obvious to mention, in which the property is divested out of the first seller; yet the remedy of the second purchaser is not direct against him, but against the intermediate person from whom he purchases. It is so in all cases where the original title of property is not concerned. A man, having the clear title to property, has a right to say, I will sell to you only; I have nothing to do with your subsequent transfers: I am answerable to you only for the delivery of the goods under your contract. The title of the second purchasers, therefore, may be perfectly good, at the same time that they could not sue the Company immediately for any part that they were to act in this transaction. Indeed, the whole second branch of the argument proceeds upon this foundation

tion, that the subsequent contract is good, to the extent of making the purchasers *Dutchmen*. For this is the second objection, that although the persons may have become proprietors, they are not *qualified proprietors* to obtain restitution, because they are, under the circumstances of this transaction, liable to be considered and treated as *Dutchmen*. It cannot be doubted, indeed, that there are transactions so radically and fundamentally national, as to impress the national character, independent of peace or war, and the local residence of the parties. The produce of a person's own plantation in the colony of the enemy, though shipped in time of peace, is liable to be considered as the property of the enemy, by reason that the proprietor has incorporated himself with the permanent interests of the nation, as a holder of the soil, and is to be taken as a part of that country, in that particular transaction, independent of his own personal residence and occupation. So the flag and pass of a nation, taken up in war or peace, binds the vessel almost without exception. So in the case of a strict exclusive colonial trade from the colony to the mother country, where the trade is limited to native subjects by the fundamental regulations of the state, and the national character is required to be established by oath, as in the case of the (a) *Spanish* Register Ships. There whoever asserts himself to be the proprietor, by the solemn averments of an oath, takes the fortunes of the community as to that property. These are all cases independent of times of peace or war, though generally it cannot be denied, that the circumstance of peace or war, or the

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(a) *Spanish* Register Cases, before the Lords, were, *The Pierre Joseph*, 1744. *The Santa Rosa, Le Bartz*, 3d Dec. 1743. *The Dauphin of France*, 28th June 1744. *L'Agatta*, 1749. *The Hesperion*, June 1754.

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contemplation of those events, will form a very material distinction in the considerations by which the national character of the transaction is to be judged. It has been so generally held up, that definitions are dangerous, that I will not presume to lay down the tests by which it is to be distinguished in all cases, whether the transaction is radically, and in its own nature a national transaction in the judgment of this Court. But I may say this, that a much greater latitude is allowed in peace than in war, and for this plain reason, because there are no rights of a third party concerned: there is no fraud to be guarded against. When war comes, it is necessary to shut up some of the avenues of commerce, because otherwise the belligerent rights could not be protected. Those avenues, in time of peace, are perfectly open, as commodious to the parties, and incommodious to nobody else; for all other parties are friends, and as such interested in their prosperity. A greater latitude therefore may, on these considerations, be expected to prevail in time of peace, and is in practice allowed. It becomes material to consider, then, at what time this transaction took place? The contract (a) begun under the prospect of peace, supported by the preliminaries. The ratification had not, at that time, been signed, but it *had taken place* before the undertaking quitted *Europe*. What would have been the case, if war had again intervened before the sailing of the ships from *Europe*, it may be difficult to say. It seems probable, that the contract would have been rescinded; for such a conjecture is warranted by the twenty-first article, which stipulates, "that if *Batavia* should be in possession of the enemy, the contract should be void." The letters express sanguine expectations of returning peace. One letter speaks of "*warlike appearances, but as meant to accelerate the peace.*" Another letter

(a) Contract 24th
Murch, Defini-
tive Treaty, 27th
March 1802.

letter says, "If peace is not concluded, still the contract " will not be disadvantageous." Peace was not concluded, indeed, at the first commencement of this speculation, but the public appearances were such, that there seemed to be no reason to fear that any inconvenience would ensue from setting the transaction on foot before the ratification was signed; and it is always to be remembered, that the contract might be altered, if war took place unexpectedly before; Upon the whole of the evidence on this point, it is, I think, clear that the parties had no such thing as a state of war in probable contemplation. As far as the effect of contemplation goes, then, it is favourable to the parties. No person can say, that there was any design to evade belligerent rights: it was indeed to relieve a pressure proceeding from a former war, but without any view of sheltering the property from capture. If the transaction is to be impeached, therefore, it must be on the ground that it is one of those transactions, which have such a national bottom and substance, that, without consideration of peace or war, they are exclusively and radically and fundamentally a national transaction; and in which the man who engages in them, assumes, *pro hac vice*, the character of that nation.—Several circumstances approximate it to a *Dutch* transaction; for, unquestionably, there is a great deal of *Dutch* agency, and even of *Dutch* interest throughout; but is it so essentially *Dutch*, that a foreign character cannot be predicated of it? What are the circumstances to which such an effect can be attributed? Certainly not the mere purchasing of goods at *Batavia* out of the Company's stores, for that we have seen done in a variety of cases, without necessarily affecting the character of the foreign purchaser.

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chafer. That this is done by a contract with the Company in *Europe*, will not invalidate. That the contract engages, that the purchased articles shall come to *Europe* in *Dutch* vessels, will not invalidate. That is a collateral matter of agreement, on the part of the Company, looking to another object, independent of the character of the merchandize to be conveyed. The duties to be paid, may be considered as involved in the price for greater simplicity and convenience. Suppose foreign merchants of any other state in *Europe* had agreed to this full extent, with the *Dutch East India Company*, I do not see that they would have departed from their own proper character in this feature of the transaction. It must be found then in some circumstances beyond this; and there are two to which such an effect is ascribed. One is, that the Company totally excluded all foreigners from this adventure, so that no man could be avowed to have any interest in it but a *Dutchman*: The other circumstance is, that this property was to be brought to *Holland*, there to be placed under the management of the Company in the sale and disposal. With respect to the first, it is certainly true, that the Company deals only with *Voute* and other *Dutch* houses; and if I found the prohibition alluded to, I think I should be bound to consider the *Dutch* character as inherent, and this transaction as *Dutch* throughout. But, on this point, I must observe, first, that there is no such prohibition to be found in the contract: secondly, that all probability is against it: and thirdly, that it is proved that there was no such intention. The Company, themselves, certify this to be the fact, "that they never meant to exclude foreigners from any derivative interests in this adventure; that they had actually negotiated

negotiated with foreigners in the first instance ; but that the negotiation had broken off only on the terms of the price. " It is, besides, observable, that the whole transaction of this sub-contract is carried on with the greatest unreserve and publicity. The documents were to continue *Dutch* between the Company and the first purchasers, because the Company resolved to look to no other, and not to be remitted to foreign countries for payment. To them it is *Dutch property*, for the purpose of *Dutch* responsibility ; that purpose served, they look no further ; and unless, it can be maintained, that he who is for particular reasons proprietor as to one person, is, on that account, to be deemed the real proprietor to all persons whatever, it cannot be said that the real interest of property may not reside elsewhere ; and *that it may so reside*, without being liable to be considered as *Dutch* by any person but those who stipulated, that, for the security of their own interests, it should be liable to be so considered *by them*, I am of opinion, therefore, that though the Company have a right to consider it as *Dutch*, looking no farther than to the first *Dutchman*, with whom they contracted, it does not necessarily follow, that those who admit that it has been actually transferred to foreigners, have nevertheless a right to consider it as *Dutch*. The other ground is, " That it was under an absolute agreement " to return to *Holland*, 'to be under the disposal and " management of the Company." The fact itself is not demonstrated to the degree that would be required to support the conclusion ; for the twenty-first article provides for the contingency of its going elsewhere ; and the penalty is not such as can be said to amount to an absolute prohibition. But if the fact were so, in what way does it convert the interest, supposing that, independent of that circumstance,

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cumstance, the interest would be found elsewhere. It is mere consignment and agency, upon a bargain between the parties, and the whole effect is limited to that agency and consignment. I do not see that it is more than one of those possible modifications of a commercial bargain, which may take place in time of peace without giving a third party, who has no interest in it whatever, a right to consider it as a transaction so exclusively confined, as to affect the national character of the parties engaged in it. Upon this view of the question, taking it to be a contract formed in what I consider as a time of peace, and in contemplation of peace, without any view to relieve a beligerent from the pressure of his enemy, which would give that enemy a right to counteract a purpose so directly hostile and mischievous to himself, by the application of a stricter rule of judgment, (and upon this admitted circumstance, that there is no infraction of third rights, I lay great stress,) I am of opinion that it is a contract which foreigners had a right to make, at such a time, without departing from their foreign character. The contracting parties have divided the possible advantages of such a transaction between them, so that many of the interest belong undoubtedly to the *Dutch*; but the interests of property belong, I think, to the foreigners. In a state of peaceful commerce they have a right so to divide them; and I shall restore those interests of property to the neutral claimant, but subject to the costs of the inquiry, which has become absolutely necessary, from the complicated nature of the transaction, and the ostensible *Dutch* character under which this property was sailing.

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(a) THE ELSEBE, MAAS.

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THIS was a case of considerable importance and delicacy, arising on an order of Government for the release of several vessels, being part of the second *Swedish* Convoy, under particular circumstances.

The power of the Crown to direct the release of property seized as prize, before adjudication and against the will of the captors, is not taken away by any grant of prize conferred in the Order of Council, the Proclamation, or the Prize Act.

The question made on the part of the Captors was, whether the Crown had such a power, or rather whether a right and interest in the thing taken did not vest in the Captor at the time of seizure, under the grant of prize made to captors by the Order of Council, the Proclamation, and the Prize Act, in such a manner as to entitle the captor to proceed to adjudication, notwithstanding an order of release on the part of Government.

The question was fully argued by the *King's Advocate* and *Robinson* on the part of the Crown, by *Laurence* and *Swabey* on the part of the Claimant, and by *Arnold* and *Burnaby* for the Captor. The material topics of argument are taken up and discussed so fully in the judgment, as to render it as unnecessary, as it would also be peculiarly difficult to give an adequate and succinct statement of the argument in this Report.

JUDGMENT.

Sir *W. Scott*.—This question, which has been very elaborately argued, arises on several *Swedish* ships with

(a) This case is reported out of the order of its date as a case of public importance, and as arising out of the transactions of the last war.

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their Cargoes, belonging to subjects of other Countries and Cities, taken under the Convoy of a *Swedish* man of war, and proceeded against on that ground. Several points have been made on behalf of the owners of the ships and cargoes, one applying to the ships as well as to the cargoes, and two that are peculiar to the cargoes. With respect to *them* it is first contended, that they belong not to *Swedes*, but to subjects of the *Hans Towns*, and that they are not involved in the penalties of *Swedish* resistance, which was an act of the *Swedish* government, and will not bind the subjects of other powers; that the proprietors of the cargoes were not privy to this fact; and that the masters of the vessels were not the agents of the cargoes, so as to bind them. This is contended on the same principle that has been adopted by the Court, in some blockade cases, where ships, sailing originally in ignorance of the war, and having been warned in their voyage, have nevertheless persisted obstinately in their original destination to the blockaded port. I am of opinion that this defence cannot be set up with effect, since in the only Charter-party which has been produced, and which must be taken as produced by the claimants as representatives of the rest, there is an express stipulation *that the ship should proceed under Convoy*. But I will take the case on a supposition that there was no such engagement. The master associates himself with a convoy, the instructions of which he must be supposed to know; he puts the goods under unlawful protection, and it must be presumed that this is done with due authority from the owners, and for their benefit.

benefit. It is not the case of an unforeseen emergency, happening to the ship at sea, where the fact itself proves the owners to be ignorant and innocent, and where the Court has held, that being proved innocent by the very circumstances of the case, they shall not be bound by the mere principle of law which imposes on the employer a responsibility for the acts of his agent. On the contrary, it is a matter done *antecedently* to the voyage, and must therefore be presumed to be done on communication with the owners and with their consent ; and the effect of this presumption is such that it cannot be permitted to be averred against ; inasmuch as all the evidence must come from the suspected parties themselves, without affording a possibility of meeting it, however prepared. The Court has therefore thought it not unreasonable to apply the strict principle of law, in a case not entitled to any favour, and holds, as it does in blockade cases of that description, that the master must be taken to be the authorized agent of the cargo, that he has acted under powers from his employer, and that, if he has exceeded his authority, it is barratry, for which he is personally answerable, and for which the owner must look to him for indemnification. I pass over many considerations which have been properly pressed in argument ; but I cannot omit to observe that this is not merely a question arising on a single act of limited consequence ; it is a pretension of infinite importance, and of great extent, being nothing less than an opposition to the general law of search, by which, if it could in one instance be admitted, the whole provisions of the Law of Nations on that head might be effectually defied :

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defined : for if this principle could be maintained, by an interchange of convoys the whole unlawful business might be carried on with security. To put the goods of one Country on board the ships of another, would be a complete recipe for the safety of the goods, with a trifling alteration, easily understood, and easily practised, whilst the mischief itself would exist in full force.

Secondly it is contended that no grant of prize made by the Crown attaches upon such property as this, because the grant is of *property of the king's enemies*, that is of the *French* and other nations with whom we are at war. But the grant is not so construed and applied.—It is held in construction and practice to embrace all property liable to be condemned as prize, and not particularly reserved by the rights of the Crown or of the Admiralty. By *fiction*, or rather by *intendment* of law, all property condemned is *the property of enemies*, that is, of *persons so to be considered in the particular transaction*; and half the business of this Court is exercised on such property, in determining whether it is not liable to be condemned as prize to the captors. It is therefore a position not seriously to be maintained, that the captors grant does not reach to this extent, by the constant course of interpretation authorizing such a construction.

These two points being disposed of, which are confined to the cargoes, another of much greater extent, as comprehending both ships and cargoes, and of still greater importance, is suggested to arise upon the facts of this case. As it was a point, on which the rights of the Crown were directly involved, I felt it to be my indispensable duty to call on those

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who are specially entrusted with the defence of the interests of the Crown, to assert and vindicate those rights, unless it was the intention either to disclaim them entirely, or at least to waive the exercise of them on the present occasion. When the rights of the Crown were brought forward by the claimant, in a way which it was impossible not to notice, the Court was bound, as every Court would be, to take care that justice was done to them. The Rights of the Crown are public Rights, conferred not merely for private purposes, or for personal splendour, but for the public service, and to answer the great exigencies of public interest, and claims of public justice ; as such, they demand the active protection of every Court, in which the occurrence of them is suggested to arise. The right which is asserted by the claimant, and is denied on the part of the captor, is that of releasing ships and goods that had been taken *jure belli*, before adjudication and *without the consent of the captors*. I say *without consent*, because I think I must hold, upon the present evidence, that the captors have not done any act, by which they can be considered as communicating their consent.

Before such a question can with propriety be introduced, it must appear that the Crown has actually exercised the power, and that the party has not renounced the benefit of it. For, if the Crown has not exercised it, or if the party has renounced the benefit, the Court would, for obvious reasons, decline to entertain a question of this high nature, without an actual necessity calling for the discussion, and would be glad to dismiss it from farther consideration. That the Crown has exercised the power in this instance, is I think sufficiently proved, by the solemn evidence of an official letter from the Secretary of State

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for the foreign department, to the Minister of that Country whose subjects were principally interested in the question, informing him *that the ships were released, and that orders were given by the Lords of the Admiralty for that purpose.* This I apprehend is the regular mode of communication with the ministers of foreign powers; and it must be presumed, that what is so communicated, unless disavowed, is the act of the State. It proceeds from those who are the organs of the State towards foreign powers and their representatives, and what they say, binds the State unless disavowed. That the order was conveyed immediately through the Admiralty, is no objection surely to the validity of the act: The conveyance of the orders is merely the subordinate and instrumental part of the business; and I take the Admiralty to be the proper channel through which the order for release should be transmitted to the captors. But even if there had been some little irregularity in the mode of transmitting such an order, an irregularity such as may and must sometimes occur in the shifting exigencies of the public service, it could in no degree have been considered, as vitiating the substance and effect of the thing. Whether the communication had been made by this or that hand signifies nothing; whether it was in writing or in words signifies nothing; the question is, whether it was so directed by the proper authority of the State: had it the seal and impress of that original authority? Through what course that direction travelled, whether by one post or the other, is a matter of small moment, and perfectly immaterial, provided the fact is clear that it proceeded from the State. It is not suggested that the Admiralty did not issue the orders. They are averred to have been procured by the

the Secretary of State, and are not at this moment disavowed, or in any manner receded from on the part of Government, after the call which the Court has made on the officers of the Crown, for the purpose of knowing in what light they are to be considered. I am bound, I think, to hold the order that has been called in question, to have proceeded from sufficient authority, and to stand at this moment unrevoked.

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The next ground that has been taken is, that the party had not accepted the release; and if this had been shewn, it would, I think have been sufficient to defeat the effect of the order. It would undoubtedly have been competent to the claimant to have said, "the restitution is defective, I will not accept it, but will go to the Courts of Justice to obtain a more ample compensation." Without imputing to the Crown an injustice, which is not to be imagined, it cannot be conceived that the party would have been denied his resort to a Court of Justice, which sits principally to enforce the rights arising from the Law of Nations. If he had appealed from the Government to the Court of legal redress, the Court must have received the complaint, and have proceeded to an ultimate determination on the quantum of the grievance alleged; and by such a conduct the party might fairly have been considered to have waived the benefit of a partial release. But I find nothing of the kind: The letter which the claimant wrote on the occasion has been very properly described to be written in most respectful terms: It is a letter of grateful acceptance, appealing only to the equitable consideration of Government, for some farther compensation on grounds therein stated; but it contains no appeal to the Court, no declining of the offer made by Government. On

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the contrary, it is rather to be taken as a total relinquishment of all legal remedy, as a statement of their case in a style of political negotiation merely, and containing nothing that can with any propriety be deemed a waiver of the release then offered. Something has been said of the lapse of time that had intervened, before the papers were brought to the notice of the Court. It has been great; but I cannot blot out of my remembrance, the important transactions to which this matter has, at least in some degree, given birth. Many years of negotiation—I am sorry to add, some months of actual hostility, passed, before this question was happily adjusted by a convention. During that period nothing was done in this Court. When the general question was settled prospectively between the parties, the question came forward with respect to the fleet of which these vessels composed a part. Whilst the question respecting the whole fleet was under discussion, these ships had a right to stand on the general ground of defence, as long as it might possibly be determined in their favour: they might feel it their duty so to do, in order that they might not prejudice the rights of the other ships associated with them. Having so done, and failed, they have now a right to resort to the benefit of the order which applied to them exclusively, and to call upon the officers of the Crown either to admit and avow these papers, or to contradict and renounce them. On this part of the case, I feel myself bound to say that the order is sufficiently authenticated; that the Crown does not disavow it; and that I must consider the case as subject to the effect of the Order, whatever that may legally be, for the release of this property.

The facts then being completely established, the
question

question of right arises, how far the Crown can release at any time before adjudication, without consent of the captors. It is an important question connected with most momentous consequences: No reflecting man can approach it, without feeling that he has to weigh a matter of extreme delicacy, though perhaps not of equal difficulty. Be the delicacy or the difficulty what it may however, it will be the duty of the Court to meet with firmness any exigencies, which the administration of justice may impose upon it.

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It is admitted on the part of the captors, whose interests have been argued with great force (and not the less effective surely for the extreme decorum with which that force has been tempered), that their claim rests wholly on the Order of Council, the Proclamation, and the Prize Act. It is not (as it cannot be) denied, that, independent of these instruments, the whole subject matter is in the hands of the Crown, as well in point of interest as in point of authority. Prize is altogether a Creature of the Crown. No man has, or can have, any interest but what he takes as the mere gift of the Crown. Beyond the extent of that gift he has nothing. This is the principle of law on the subject, and founded on the wisest reasons. The right of making war and peace is exclusively in the Crown: The acquisitions of war belong to the Crown: and the disposal of these acquisitions may be of the utmost importance for the purposes both of War and Peace. This is no peculiar doctrine of our constitution; it is universally received as a necessary principle of public jurisprudence by all writers on the subject, *Bello parva cedunt reipublica*. It is not to be supposed that this wise attribute of sovereignty is conferred without reason; it is given for the purpose assigned, that the

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power to whom it belongs to decide on peace or war, may use it in the most beneficial manner for the purposes of both. A general presumption arising from these considerations is, that Government does not mean to divest itself of this universal attribute of sovereignty, conferred for such purposes, unless it is so clearly and unequivocally expressed. In conjunction with this universal presumption, must be taken also the wise policy of our own peculiar law, which interprets the grants of the Crown in this respect by other rules, than those which are applied in the construction of the grants of individuals. Against an individual it is presumed, that he meant to convey a benefit with the utmost liberality that his words will bear. It is indifferent to the public in which person an interest remains, whether in the grantor or the taker. With regard to the grant of the sovereign it is far otherwise. It is not held by the sovereign himself as private property; and no alienation shall be presumed, except that which is clearly and indisputably expressed.

With these rules of interpretation the title deeds of the captors must be considered, to determine whether the Crown has in these deeds renounced that power, which in principle it possesses, and in practice has frequently exercised. If there is any thing which can be supposed to produce that effect, it must be the conveyance of a right of some species or other to other persons, and these can be no other than the captors, in virtue of which they claim an indefeasible interest in prize once taken. The right contended for, is a right to *seize and bring to adjudication* all ships of the Enemy. Does the right to *seize*, thus generally given, alone bind the Crown, so as to bar it from any further exercise

exercise of its power with respect to seizures? Certainly not; for after that right is given *to seize all ships of the enemy*, the Crown can exempt as it sees fit. The Crown, which declares general hostilities, can limit their operation: It can except individuals: It grants particular passes: It exempts particular classes of the enemies ships notwithstanding *the right* thus given *of seizing all ships*. If then the right of seizing all ships thus generally given, does not bind the Crown, in its power of qualifying that right by subsequent modifications; on what ground is it contended, that the exercise of its power, with respect to proceeding to adjudication, is barred by the mere act of seizure? The mere act of seizure surely cannot work any such effect: it is an act in itself in some degree always dubious till adjudication, and possibly erroneous; yet this dubious act is to convey to the party a right indefeasible *to proceed to adjudication*, when the very proceeding may be a further wrong done, an aggravation of costs and damages already occasioned by the improper seizure! I attended with great impatience to the able argument of Dr. *Arnold*, to learn what was the specific nature of the right conferred on the captors by the act of seizure, to which the effect of barring the power of the Crown to release is to be attributed. It is admitted to be, in *degree*, an *imperfect right*; In *species* it was stated, if I understand the argument, to be, a *jus persequendi*, a right of action, and no more; no right of interest, but a *mere right of bringing to adjudication*. *Whatever* is the nature of this right, it is conveyed only in the Order of Council, it is not given in the Proclamation or the Prize Act. It is indeed recited in both, as a thing otherwise existing, but it makes no part of the powers conferred

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in either of those instruments. Now, according to the construction which is in my opinion to be put upon this matter, this *jus persequendi*, as it is called, is *not a right* conveyed, *but a duty enjoined*. Captors have generally a right to seize, subject to this duty of bringing to adjudication—a duty enjoined, that they may not make seizures, without bringing the ships and goods seized to the notice of the proper Tribunal, in order to prevent the right of seizure from degenerating into piratical rapine. If the Crown imposes that obligation, the Crown can release it. Supposing the Proclamation and Prize Act to be out of the way, and that the matter stood singly upon the Order of Council, there can be no doubt that the Crown could so release. The Crown imposed the obligation, and so far as the Order of Council alone is considered, the Crown retains the whole interest. If the prize is condemned, it must be condemned to the Crown, and for its interest, for the Order of Council gives no interest to Captors. No doubt could exist, supposing the matter to stand on the Order of Council alone, that the Crown is completely *dominus litis*, and also *dominus rei litigatæ*, supposing there is no claim maintainable on the part of any neutral proprietor.

As far as any right to the extent contended for can be supposed to be vested in the Captor, then, it must be attributed to some enlargement of these rights given by the Order of Council, derived from the Prize Act and Proclamation. Let us consider what this enlargement is. The Proclamation gives the whole property, but *not till after adjudication*: until that time, no beneficial interest attaches. So the Prize Act in like terms gives *the whole interest or property*, in opposition to that proportional and partial interest given by former

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mer acts, (a) *but not till adjudication*. In adverting to these instruments, it is impossible not to remark the very guarded terms, in which the benefit is conferred. The Proclamation gives to privateers "*after final adjudication, and not before;*" not merely *after adjudication*, but superadding a negative pregnant, "*and not before.*" With regard to King's ships, the grant is expressed with similar caution; it gives the neat produce of all such prizes taken, *the right whereof is inherent in us and our crown*. And again, "It directs that such prize " may be lawfully sold or disposed " of, by them and their agents, *after the same shall have been to us finally adjudged lawful prize, and not otherwise.*" What is the use of these guarded expressions? surely not merely the object of protecting the interests of the claimant till after adjudication. The Crown cannot be supposed to be anxious to make a reservation or exception of that, which, without any such exception, would be perfectly safe; for no interest of the Crown or its grantee could divest the interest of the Claimant. The reservation must, *an necessitate rei, ex defectu alicujus alterius materiae*, apply

(a) Before the statute 6th *Anne*, which first gave to the captors the whole or *sole* benefit, as it is there termed, and which has been continued in the several Prize Acts passed since that time, the statute 4th and 5th *William and Mary* had given to privateers four fifths of the cargo, and the whole of the vessels; and to King's ships one third. This statute had regulated the practice till the conclusion of that war, which happened in 1697. On the breaking out of the ensuing war against *France*, a proclamation, issued 1st *June* 1702, giving to her Majesty's ships half, and to privateers the whole benefit of prize; but no general Parliamentary Regulation during that war appears to have passed on the subject prior to the statute 6th *Anne*, in 1708.

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* Lord Kenyon,

stances; (a) they have been cited in the argument; but I will appeal to the judgment of every person of any experience in these Courts, whether a doubt ever existed on the subject in any man's mind, till it was excited by, I will not say, a *dictum*, but by an interrogatory or question of a Noble and Reverend Person * in the argument upon the *St. Jago*. It will not be supposed that I mean to treat the memory of that eminent Person with the slightest disrespect, when I say that it was an unexamined and unweighed *dictum* in that particular case, and, upon a subject, not generally familiar to his most excellent understanding. I cannot think that *He himself* would have regarded such an hasty excursion of his mind, as that which he would deliberately have followed, if he had been called upon to apply himself to the serious discussion of such a point. To this *dictum*, be its authority what it may, I must oppose *that* of his Predecessor, to which I have already adverted, "*that the crown does not interfere,*" because it would be nugatory to speak of *not interfering*, if the right was altogether denied to exist. *As to the practice of this Court*, it has undoubtedly not been guided by the opinion intimated in that *dictum* of Lord Kenyon. On the contrary, the same measure has been adopted in the cases cited in argument, the *Johannes*, the *Freya*, and the *Havre* cases; in all which

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- (a) Modern instances cited, as subsequent to the regular grant of the whole benefit of prize to the captor by act of parliament in 1708, were, the *Freya*, (b) the leading case of a *Danish* convoy brought in, but restored by negotiation with government; the *St. Johannes*, one of the first *Swedish* (c) convoy, released by the captor under an order from the Lords of the Admiralty; the *Edwin*, (d) an *American* vessel which had sailed for the port
- (b) 29th July
1800.
- (c) 1798.
- (d) November
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which the Court conceived itself to be doing no more than its duty in obeying the order for release. It is true that the captors did not oppose in those instances; but I have already stated the grounds, on which I conceive that they could not have been heard by the Court, in an effectual support of any such opposition. There is besides one class of cases, from which we may I think infer, that such a power must be supposed to exist in the Crown; I mean cases (a) of restitution at the close of a war. It is a frequent practice to stipulate in the Preliminary articles of Peace, for a cessation (a) of hostilities at certain times, in different latitudes, and for the Restitution of property taken afterwards; and this as well within, as beyond, the period assigned for the Ratification of the Preliminary Articles themselves. The same

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(a) *Adolphus Frederick* captured 2d May, 1748, Proclamation 5th May, announcing the cessation of hostilities in the channel from 12 days after the 19th April 1748, being the date of the signature of the preliminary articles of the peace of *Dix la Chapelle*—restored by decree of court 17th May 1748.

port of *Havre* with other *American* ships, in 1801, under some misunderstanding as to the blockade of *Havre*, and was released in consequence of a letter of 24th Nov. 1801, from Lord *Hawkebury*, directed to the King's Advocate, "stating the special circumstances which had led to an ignorance of the blockade on the part of the *Americans*, and expressing his Majesty's pleasure that all the rights and interests which may belong to him in such captured vessels and cargoes, shall be given up and released."

More ancient instances, prior to the Prize Act of 1708, were, an order of council 1705, for the release of certain *Dutch* ships seized and brought in, for trading with the common enemy. 4th *Admiralty Reports*, page 254, Note. The *Salvador*, 31 Aug. 1704, on which there was an order of council addressed to her Majesty's Advocate, for the release of certain *Swedish* ships which had been captured under a *Swedish* convoy, after a contest between the *Swedish* man of war and Admiral *Whetstone*. 15th Aug. 1689, an Order of Council for the release of certain *Danish* ships. 23d Sept. 1609, an Order for the release of certain *Portuguese* ships. 27th July 1589, an Order of Council communicated to the Court of Admiralty for its direction in proceeding against the ships and contraband cargoes of the *Hans Towns*, going to Spain, and seized by Queen *Elizabeth*. *Collectanea Maritima*, p. 163. Note.

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provision is afterwards inserted in the definitive Treaty. In matters of treaty, it is true, the act of ratification may be said to operate with retrospective effect, to confirm the terms of the treaty from the date of the Preliminary Articles. But it is not easy to conceive a power lodged in the Prerogative of the Crown, to secure that retrospective effect, to the *conclusion* of a Treaty, without supposing also a corresponding power over the acts of its own subjects, to supersede the intermediate events of war, and to annul captures, *rightly made*, up to the moment of ratification, under the only known rule of action, then promulged, and communicated to cruisers, for the government of their conduct.

Something has been said of the hardship, which captors may sustain, if they are to be held liable to costs and damages, and are at the same time denied the power of proceeding to adjudication; and to be sure nothing could be more unjust, than to leave the captor at the mercy of the claimant for costs and damages, by taking from him the power of justifying the seizure. But to this objection, I think, two answers may be given, either of which removes the possibility of such injustice, even if the fact could be supposed (which cannot be supposed without the most extravagant indecency) that the Crown in the transaction had left its officer totally unprotected. First, that after acceptance of such an extrajudicial release, the claimant would no longer be competent to proceed against the captor; the act of acceptance would be considered as a waiver of his judicial remedy, as a total release on the one side and on the other; and if the captor was to appear under protest, alleging that the claimant had accepted such an extrajudicial release, I cannot but think that the Court would pronounce the protest to be well founded, and
dismiss

dismiss him from any farther responsibility; or *secondly*, if the Court *did not* overrule the protest, it surely would not deny the captor his right to proceed, not indeed for the adjudication of any prize interest under the seizure, but for all purposes of justification.

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To considerations of public policy. upon such a question, I decline to advert at any length, for two reasons; one is, because my judgment must be formed on grounds of another species—on the legal construction of the Order of Council, the Proclamation, and the Act of Parliament. If those have in fact taken away the right of the Crown, against the public interest, be the consequences ever so mischievous, the remedy must be sought not in erroneous judgments here, but in wise legislative provisions elsewhere. Another reason is, that the considerations of public policy are too vast, and too obvious, not to present themselves to every man's imagination. When I state the position contended for on the part of the captors to be in effect this, that it shall be in the power of every man who has made a capture, of the pettiest commander of the pettiest privateer, to force on, in spite of all the prudence of the Crown opposed to such an attempt, the discussion and decision of the most delicate questions—the discussion and decision of which, may involve the Country in the most ruinous hostilities, I state a proposition, that must awaken the apprehension of every man who hears me as, to the extent of the danger which would attend the establishment of such a principle. It has been stated, and truly stated, that great encouragement is due to the navy of this kingdom; I feel this I hope in its full extent; and I can have no doubt that it is still more sensibly felt by the Government of this Country; but I must presume, that, in estimating

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estimating duly the weight of that consideration in any particular cases, the Government will likewise estimate the weight of other public considerations, which in those particular cases may happen to be still more urgent, and more important, high and important as that consideration unquestionably is.

On the whole case, I am of opinion that all principles of law, all forms of law, all considerations of public policy, concur to support the right of release prior to adjudication, which I must pronounce to be still inherent in the Crown. It is with peculiar satisfaction of mind that I reflect, that if I have erred in forming this opinion, the law has provided more ways than one in which the effect of the infirmity of my judgment may be repaired, to the relief of the parties who feel themselves aggrieved by it.

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Cartel—
Privileges of, allowed to a ship employed in carrying from *Martinique* to *France*, certain French prisoners taken at *St. Lucie*, agreeable to the understanding of the commanding officer of the *British* Forces at *St. Lucie*, though not strictly provided with the formal documents of Cartel, &c.

THIS was a case of a *French* ship, captured on a voyage from *Martinique* to *France* and claimed by the master as a *cartel* ship, as sailing under the passport of the *British* commander at *St. Lucie*, for the purpose of carrying General *Noques* and other officers taken at *St. Lucie* to *France*.

On the part of the Captors, *Laurence* and *Robinson*.
—On the effect of such protection as this is assumed to be, there can be but one opinion, when the ordinary mode of conducting a transaction of this kind is simply pursued, and established in proof before the Court. The delicacy of cases of cartel is felt by all; but the high good faith to be expected in such contracts will be most effectually secured; by preserving the simplicity

of the contract itself, and by allowing no latitude of interpretation, beyond the obvious meaning of the Grantor. Safe conducts are described by writers on the law of nations, as proceeding entirely from the will of the Grantor. In all doubtful cases, they are to be restricted to the obvious meaning of that will, and are not to be extended to include more than was obviously intended,* and necessary to carry that intention into effect. What are the facts of this case? It is endeavoured to bring within the sanctity of cartel a valuable ship, which has none of the ordinary characteristics of a cartel Ship belonging to her. She was a merchant vessel, which had carried out troops from *France*, and appears to have been lying at *Martinique* unemployed, and without hope of getting home in safety to a *French* port. In this situation a charter-party is made between the Officer of Government at *Martinique* and the *master*, in which the vessel is taken up as a *cartel ship*, as she is there denominated, and is chartered to carry to *France*, with a flag of truce, General *Noques*, and about fifty other persons, who had been made prisoners of war at the surrender of *St. Lucie*. The whole of this pretension rests on the gratuitous assumption of *French* parties. There is no passport from the *British* Admiral, nor a word respecting her, in all that passed between General *Noques* and the *British* Commander at *St. Lucie*. In former discussions, on a similar subject, the Court had occasion to observe, (a) "that it is not the employment alone that is held to convey a necessary protection, but that the security is derived from the *special safe conduct*, which would be unnecessary, if the mere service were sufficient." The special character should, in all cases where an opportunity offers, more properly proceed

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* *Vattel*, b. 3.
ch. 17

(a) *The Duffne*.
3. Adm. Rep
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from the act of some person in authority, on the part of the nation against which the protection is assumed. As to the *service* in this instance, it is not a *Cartel Service*; which is generally to facilitate an intercourse between hostile Ports. The voyage is from one French port to another; and as to the protection of *Passports*, from any Person or authority on the Part of this Country, the master does not pretend to have had any other passport, than what he carried out with him from *Bordeaux*. It was owing to the want of some such document, that the truth or sufficiency of his pretensions to cartel were called in question; and on this ground only, according to the evidence of the *French* master, the captor, proceeding with great caution and delicacy, thought himself justified in bringing this vessel to adjudication. Recourse is now had to the personal safe conducts which General *Noques* and the other persons on board had received from the *British* Commander at *St. Lucie*. On the surrender of that island, it seems that permission was given to General *Noques* to proceed to *Martinique* or to *France* on his parole. This permission arose entirely out of the request of General *Noques* to be allowed to go on his parole, and though it was extended afterwards to other persons, the terms of their safe-conduct extended no farther than “to go to *Martinique* or elsewhere, in a neutral ship or flag of truce.” These gentlemen went to *Martinique*, and there, without the intervention of any authority on the part of this country, the character and exemption of cartel, in favour of this vessel, is engrafted on these mere personal passports for the security of the gentlemen themselves. Was it reasonable that such effect should be attributed to them? Suppose their

their affairs had led them different ways, could it be contended, that each person might have hoisted his cartel flag, and have protected a separate ship? Could there have been any such understanding between General *Greenfield* and General *Noques*, at *St. Lucie*? The whole permission arises out of the request of the *French* general, and should be restricted to it. In that request there is not a word of any such consequence. Had General *Greenfield* any authority to grant such protection to a vessel which had never been under his power? In capitulations, the act of the commander on all property, which is the object of the contest, and as such subject to his discretion, would undoubtedly be binding; but *St. Lucie* was taken by storm; there was no capitulation. If General *Greenfield* had intended to give up a *French* vessel in safety, why did he not send off one of those taken at *St. Lucie*. Nothing of that kind is done. The Conventions (a) of commanding officers are in some respects to be strictly construed; and it might, on just grounds be questioned whether General *Greenfield* had authority to grant protection to a vessel sailing from another place, that had never been under his authority. Without insisting, however, on the *invalidity* of such an act, if actually done, it will be sufficient to infer from the questionable nature of the act itself, that all general pro-

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(a) Les Conventions de Généraux, dont nous venons de parler, regardant les Affaire d'autrui, le sens en doit être restreint, autant que le permet la nature de l'accord; en sorte que, d'un côté, le Souverain ne soit point engagé par là plus qu'il ne voudroit, s'il traitoit lui même; and que, de l'autre, les Généraux ne souffrent point de dommage en faisant leur devoir. "*Grotius*, l. 3. ch. 22. § 10.

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bability is against such an intention on the part of the British officer. The case set up is a case of exemption, in which the burthen of proof lies on the party asserting such a privilege. As the evidence adduced by no means supports the claim, the vessel cannot be held entitled to protection, but must stand upon the same footing as any other enemy's ship, and as such be subject to condemnation.

On the part of the Claimants, Swabey and Adams contended—that it was a transaction of perfect good faith on the part of the master; that it was made a condition of the charter-party that the vessel should be fitted out strictly as a cartel ship, without taking a cargo or bearing arms; that the passports of General *Greenfield* and General *Brereton* went beyond the purpose of granting a mere personal protection to these gentlemen, and were represented to the master as sufficient to confer the protection of cartel; that the Court would consider such a transaction most favourably to support the good faith of the nation, and protect the claimant against a mere defect of form, if indeed these passports should be held not to come up to the formalities usually observed in cases of cartel.

JUDGMENT.

Sir *W. Scott*.—This vessel was taken sailing under a flag of truce, that is, under the *English* and *French* colours joined together. The flag of truce alone would not be sufficient to afford protection, because it might be fraudulently assumed, or without authority. A claim, however, is given under a special representation of the circumstances that led to this transaction, stating it to have arisen from the agreement of General *Greenfield* and

and certain *French* Officers, who had become prisoners of war on the capture of *St. Lucie*. Something has been said, in argument, of the extent of the power of General Officers to contract with the enemy in Capitulations. Certainly, nothing can be more sacred than such agreements: they are to be held most inviolate; it is scarcely possible to conceive any term, however incommodious, that ought not to be most faithfully observed in the execution of such contracts. This, however, is not an agreement of that kind. It appears that *St. Lucie* was taken by assault, without any capitulation, and that after the surrender, General *Greenfield* granted permission to the *French* General to proceed to *France*, on parole not to serve again till exchanged. It was therefore not a contract, as far as appears, of mutual benefit, but a matter of indulgence, to be favourably considered indeed, as the act of a General Officer who may be supposed to have been the best judge of the propriety of the measure at the time; but something, which does not bind his country precisely to the same extent, as a capitulation of war, by which some return of advantage is stipulated and obtained for his Country. General *Greenfield's* letter, which is first to be considered, states, "that General *Noques*, being desirous of returning to *France*, has my approbation, and is at liberty to go to *Martinique*, and afterwards to *France*, on condition," &c. This is a personal liberation, and by no means ascertains the vehicle in which he was to go. It does not appear from this instrument, whether General *Noques* was to take a *French* ship and protect her under this permission; nor indeed whether the mode of conveyance had at all entered into the contemplation of the parties. It would therefore be impossible for me to

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determine on the evidence of this letter alone. There is another letter from General *Brereton*, who was left in command at *St. Lucie*, which, in answer to a second application, to include certain other persons, grants permission, "to go to *Martinique*, and afterwards to " *France*, as they might find most convenient." That also is a very general expression : which might refer only to their *own situation and character*, and might only mean that they should go in the most undisturbed manner, provided they found neutral ships, or cartels, or any other innocuous vehicle. There is a third instrument from General *Brereton*, which signifies " a permission to go to *Martinique and France*, in a neutral ship or flag of truce, or elsewhere, where their affairs may require." These Gentlemen go to *Martinique*, and there this vessel is taken up as a *cartel ship* by virtue of this permission, though not strictly a cartel ship ; and certainly, if the master can be supposed to have entered into this engagement sincerely, under the persuasion that he was to be protected by the privileges of cartel, without considering strictly how far the authority of General *Greenfield* might be competent to confer such exemption, I think, that the Parties will be entitled to very indulgent considerations, in regard to the restitution of this property. The claim is given on the affidavit of the master, who certainly does not support his averment in the full extent : but he does not appear to be exposed to any imputation of *mala fides* on that account. He states the agreement of the *British* commander to have been, " that these gentlemen might go in any *French* ship which they could take up." That is not to the full supported by any evidence that appears in these papers. If, under such a representation of the agreement, made
to

to this man, the French Officers had taken up this vessel, it would, I think, be straining matters to a degree, not quite discreet or legal, to object against the validity of such a protection, that it was not strictly in the form of cartel, unless it could be shewn that such pretensions had been brought forward from some unfair or fraudulent motive. It is possible, that in this representation the master spoke only according to what he had learned in conversation, and relied upon, as an honest communication, for he was no party to the original agreement. What I shall direct in this state of the case will be, that affidavits may be introduced to shew what the real understanding on this point was, between General *Greenfield* and the *French* General, and whether the representation made to the master, was conformable to what he states in his affidavit.

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On a subsequent day, 19th *July*, the affidavits of General *Brereton* and General *Noques* were exhibited, by which it appeared, that the course of the transaction had been agreeable to their joint understanding of the permission granted. On this evidence,

Court.—When this case came on before, the Court intimated a disposition to sustain the claim, if it should appear to have been the understanding of the parties, and particularly of the Party granting the Permission, that a ship sailing on this service, under a flag of truce, should be protected, though not strictly a cartel. Whether the *British* commander might have exceeded his powers, or have made an imprudent concession, would not, I think, supersede the obligation which this Court would feel itself under, to support the good faith of the agreement, on which

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* Adm. Repts.
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the other party had acted with confidence. The prisoners were sent to *Martinique*, probably for mutual convenience; This contract was then entered into between the prefect of the Government of that place, and the master of this ship, under the direction of the Captain General. It is now certified not to have exceeded the intention of the *British Officer*, under whose permission these prisoners were allowed to return to *France*; and that is the point to which I principally look, and which approaches to the foundation of the principle laid down by the Court in the case referred to.* Something has been said of the bad faith which the Government of *France* has practised on some similar occasion, in detaining a vessel sent regularly as a cartel ship from this country to a port of *France*. Such a behaviour would, on no account be resorted to as a precedent, to which this Court would attend, in considering the proper effect of the proceedings of these parties in this transaction. I am of opinion, that the representation of the claimant is substantially confirmed by the *British Officer*, and I shall decree restitution; giving the captor the expences of taking the depositions, and of the farther proof that has been necessary to clear up this matter.

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THE MARY, FOLGER.

Cartel —
Act of release
by Prisoners
under Cartel
invalidated.
Property so
received, does
not fall under the
Provisions of the
Prize Act for
British Property
recaptured from
the Enemy. — Not
restored to the
original Owner,
but given up to
the Disposal of
his Majesty,
at the Prayer of
the Crown.

IN this case another question of cartel came before the Court, which, from the public importance of a right understanding of such matters, is here brought forward without regard to its order of date.

It

It appeared that the *Mary* was a *British* Whale ship, which had gone into the *Cape of Good Hope* for a supply of provisions, and ignorant of hostilities. The ship was seized, and the crew imprisoned, except the first and second mates, who were allowed to go at large on their parole, and a prize-master and five men were put on board the vessel. In the mean time the *Matilda*, an *English* cartel ship, came in, going with French Prisoners from *Pondicherry* to *France*. (a) The crew of the *Mary*, with the two mates, were put on board the *Matilda*, with an intimation, according to their evidence, taken at *St. Helena*, "that they were to consider themselves as prisoners of war," "to be carried to *France*, and be there exchanged." In the night of the 4th of *February*, these men let themselves down in the boat of the *Matilda*, and got on board their own vessel and took her to *St. Helena*, where she was detained by the Governor, and sent home, with an account of the transaction to the officers of Government. Proceedings were instituted on the part of the Crown, alleging the capture to have been made illegally, and praying that the Court would direct the vessel to be given up, at the disposal of his Majesty. An appearance was also given for the original owners for restitution of their ship, and for the crew for salvage, as in a case of rescue.

After some discussion of the facts, the Court stopped the argument: observing—It appears to me, that the Court is not at present sufficiently instructed as to some

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(a) The Preamble of the agreement stated the *primary* Destination of the *Cartel* Ship to have been to *France*, for the purpose of exchanging the French Prisoners, but the terms of the Cartel, with respect to these Mariners, were, that *they* should be sent to *England*, to be there exchanged for Dutch Prisoners.

material

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material circumstances of the case,—whether these men were going to *France* or not, and whether they came on board by their own consent, or under any engagement, in which Captain *Shaw* the *English* Commissary pledged his faith for them. It may be a question whether Captain *Shaw* might have authority to bind them to his act; but that question may not arise, if they were put on board with their own free consent, and acquiescence, to be carried to *England*, and under engagements to conduct themselves inoffensively. That is one possible state of facts. It is likewise possible, that another very different state of facts might have existed, namely that they were forced on board this vessel, to be carried to *France* as prisoners of war. In that case, the cartel ship would be no cartel to them; it would be a prison ship, and no more; The propriety of their conduct in effecting their escape, and the liberation of their own vessel, would be most materially influenced by the rights and the duties resulting from the one situation or the other. According to their own representation, they were involuntary prisoners destined to *France*. It is of importance to learn from Captain *Shaw*, whether this representation is well founded, and I direct the case to stand over till the return of Captain *Shaw*, who, I understand is shortly expected.

On this day the case came before the Court on the affidavit of Captain *Shaw*, with a copy of the articles of Cartel annexed, by which it appeared, “that in consequence of the representation made by Captain *Shaw*, of the great want of able Seamen to navigate the Cartel Ship, and of Captain *Shaw*’s proposal to take on board the Crew of the *Mary* to be exchanged in *England*; these Mariners were given up to him under a stipula-

tion, on his part, that he would not dispose of, or leave them, at any place on his voyage; but that he would convey them in security to *England*: That the terms of their release were made known to the prisoners, and that they expressed great satisfaction in them, and promised to work and give every assistance in their power."

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JUDGMENT.

Sir *W. Scott*.—This Ship, being an *English* South Whaler, went into the *Cape of Good Hope* ignorant of hostilities, and was there seized. The men were taken out and put into a *Dutch* prison; after they had been there some time, an *English* cartel vessel, with *French* prisoners from *Pondicherry*, came in, and a negotiation was set on foot between the *English* Commissary of that cartel, and the *Dutch* Governor, for the release of these men, for the purpose of carrying them to *England*, to be there exchanged for *Dutch* prisoners.

When the cause came on before, the place of their destination was not sufficiently established. It was represented on the part of the mariners, that they were to be carried to *France*, which might be a change of situation very disadvantageous to them, as they might perhaps be reasonably unwilling to exchange a *Dutch* prison for a confinement in *France*. Under these circumstances it was contended, that they would be under no obligation as to their behaviour; but that they would remain perfectly at liberty to effect their escape, in any manner that they could. It now turns out, from the affidavit of Mr. *Shaw*, "that their destination was to *England* and not to *France*; that they expressed great satisfaction at the opportunity afforded them of a return to their native country, and engaged for their peaceable demeanour." The case becomes, therefore,
in

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in this view, extremely different from a case of oppression, and continued imprisonment, exercised upon unwilling parties. What the law might have been in such a case, it will not be necessary to enquire; Whether they must have been held bound by the undertaking of a person acting as Commissary for prisoners, and coming there in that character, and with apparent authority, I will not take upon me to determine; as the question does not necessarily arise out of the circumstances of this transaction. I should be unwilling to drop an expression, that might be thought to derogate from the sacredness of cartel vessels, or to diminish the inestimable utility, which the world enjoys in the acknowledged inviolability of their character: I shall therefore decline to enter upon a question, that is rendered unnecessary by a material fact in this case, which now turns out to be, that these persons were put on board by their own consent, on terms that were explained to them, and fully acquiesced in by themselves. They were bound, by their own engagement, as strongly as men could be, to abstain from all acts of violence, and to do nothing which had the least connection with hostility. In violation of the duties which they had thus stipulated for, from a spirit of heedless enterprize, belonging to such men, I imagine, rather than from any more improper motive, they seize the boat of the cartel ship, attack their own vessel by the means of this boat, and carry her off by force against all opposition. At *St. Helena*, where they carried her, she is detained by the Governor, as having been taken from the *Dutch* by an illegal act of capture, and is sent here for the judgment of this Court. The ship and cargo have since been converted into money, and the parties now before the Court are—The Crown standing in the character of the representative of this Country in its

foreign relations—The Owners praying restitution of their property, as in a case of an ordinary recapture,— And these Mariners praying salvage. Of the claim for salvage I have already disposed, by the observations which I have just made. The whole case of the salvors is *a case of demerit*, and a demand of remuneration, is the last, which in prudence they ought to make.

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On the claim of the original Proprietors, I am of opinion, that it is not such a recapture as will revert their interest. It is contended, that it falls under the the general terms of the prize act, which directs *Sec. 39.*
“ *that all ships and goods belonging to his Majesty’s subjects, which were before retaken and surprized by his Majesty’s enemies, and are at any time afterwards surprized and retaken by any of his Majesty’s ships, &c. shall be restored, on salvage.*” But I cannot think that this recapture is of such a nature, as can be deemed *a legal capture*. An act which is in itself illegal, can convey no right. It must be understood that the *surprising and retaking* described by the act of parliament, must be *such a surprising and retaking*, as the law would acknowledge and justify, and not such a *surprising and retaking*, as being in itself piratical, must be deemed a nullity as to any legal effect. Here is a *surprising and retaking*, that has been effected through a violation of contract, by persons pretending to act upon rights which they had parted with, as well by their own engagement, as by the nature of the situation in which they were placed. Such an act is essentially invalid, and can have no legal consequence attached to it, either for the benefit of those persons themselves, or for the benefit of others who may claim through them.

It has been objected that there is no complaint before the Court, on the part of the *Dutch Government*; but the actual feelings of the *Dutch Government*

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ment are sufficiently apparent from the affidavit of Mr. *Sbarw*, who states, " that the crew of the cartel were immediately thrown into prison ;" a *consequence* which sufficiently demonstrates the extreme mischief, and inconvenience, resulting from inconsiderate attempts of this kind. After such an expression of feeling on the part of the *Dutch Government*, it can scarcely be doubted, that some representation *was made* of the injury received ; though the forms of proceeding here may have prevented it from being brought immediately to the notice of the Court. Independent of such a remonstrance, considering the *Dutch Government* to be aggrieved, as undoubtedly an Enemy may be aggrieved, by an undue exercise of the rights of war, and considering the interest which the Crown has in preserving the sanctity of good faith in all our public relations to foreign States, I cannot think that the Court will be guilty of any injustice, in decreeing this property to be delivered to his Majesty, to be *by him disposed* of, as his sense of justice towards the injured Government may direct.

A P P E N D I X.

INSTRUCTION, 24th *June* 1803.

IN consideration of the present state of commerce, we are pleased hereby to direct the commanders of our ships of war and privateers, not to seize any neutral vessel which shall be carrying on trade directly between the colonies of the enemy and the neutral country to which the vessel belongs, and laden with the property of inhabitants of such neutral country : Provided that such neutral vessel shall not be supplying, nor shall have on the outward voyage supplied, the enemy with any articles contraband of war, and shall not be trading with any blockaded port.

INSTRUCTION, 1st *February* 1805.

WHERRAS we have judged it expedient that interruption should not be given to the supplying the kingdom of *Spain*, in its present distress, with grain, notwithstanding the existing hostilities : we do hereby direct, and strictly enjoin the commanders of our ships of war and privateers, not to molest any neutral vessel laden solely with grain, and going to *Spain*, to whomsoever the said grain may belong, unless it be brought from, or be destined to, a blockaded port.

R E P O R T S

O F

C A S E S

DETERMINED IN THE

HIGH COURT OF ADMIRALTY,

Q. C. Q. C. Q. C.

SAN ANTONIO, ———

May 30th,
1864.

THIS was a question respecting a flag share, demanded by Lord *Keith*, as Commander in Chief of the station to which the capturing ship was attached, and resisted on the part of Sir *J. Saumarez*, on a suggestion that he was acting under separate orders from the Admiralty.

Flag share—
Suggestion on
the part of Sir
J. Saumarez
that he was em-
ployed on a
separate service,
by order of the
Admiralty, not
sustained.

On the part of Lord Keith, the King's Advocate and Laurence. This question comes before the Court on an Act on Petition, stating all the Circumstances on which a right to a flag-eighth is demanded by Lord *Keith*, and resisted on the part of Sir *J. Saumarez*. The proclamation of the late war, by which the question is to be decided, directs, "That when an inferior flag officer is sent out to reinforce a superior flag

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officer, that superior flag officer shall have no share in prizes captured by the inferior flag officers, before he arrives within the limits of the station of the superior flag officer, and actually receives orders from him." That Sir J. Saumarez had arrived within the station cannot be doubted, as he had arrived at *Gibraltar*, which is an important post of that station, where the Commander had been much resident, and where it might be expected that general orders would be left; and, in fact, a ship was left at *Gibraltar* to communicate orders, quite sufficient to answer the words of the Proclamation. As little doubt can arise on another important point, that Sir James Saumarez was intended by the Admiralty to be placed under the orders of Lord Keith; this is manifest from the whole tenor of his instructions; and although he was directed to correspond with the Admiralty, he was also directed to correspond with Lord Keith, and to give him notice of his operations. The orders left behind at *Gibraltar* by Lord Keith, on going to a distant part of his station, were addressed, "*To Sir Erasmus Gower, or any other flag officer appointed to act on this station.*" They were not confined to one in particular, but were directed to all who should be appointed to act on that station. Sir Borlase Warren had opened them, and acted in conformity to them, and had left them for other officers who might succeed. Sir James Saumarez arrived in June, after having engaged the enemy's fleet in *Algeiras Bay*. That he considered himself under Lord Keith's command is evident, from his own conduct in writing to him an account of that engagement, and in taking with him a vessel belonging to Lord Keith's squadron, when he failed

failed again in quest of the enemy. But the defence set up is, "That though these orders might be received, Sir *James Saumarez* never read them, and that he was not acting under them." This is an averment that can on no principle be admitted. Here were orders delivered to him by Captain *Prevost*, "as general orders for all flag officers coming here to be under the command of Lord Keith;" and if an inferior Officer could be at liberty to refuse to open them, it would be in his power to keep himself detached from the station, and under the orders of the Admiralty, as long as he pleased. The Act of Court goes on to state, "that Sir *J. Saumarez* received a letter from Lord *Keith* in the month of *August*." But surely it cannot be contended that it is necessary, that the orders described in the Proclamation should be issued to each inferior flag officer individually, and after the Commander in Chief had received intelligence of that particular officer's appointment. It is next stated in the Act, that the orders had been opened by Sir *Borlase Warren*, as if it was intended to be maintained that their effect would, with regard to other succeeding flag officers, be defeated by that circumstance. This surely cannot be contended. They were general orders, left, as the standing regulations of the fleet, at the place where all officers appointed to that station might be expected to call. All the grounds of defence that can be collected from the Act of Court, must fail to bring this case within the restrictions which create exceptions to the general right of flag officers under the Proclamation, and consequently Lord *Keith's* claim to his flag-eighth must be established.

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On the other side, Arnold.—That Sir J. Saumarez was arrived within the limits of the station, cannot be denied; but the question is, whether the case, under all its circumstances, falls within the words of the Proclamation. The service on which Sir J. Saumarez was sent, was not for the general purpose of reinforcing Lord Keith. It is not so expressed: It was not so in substance. He was not directed to follow the course which Lord Keith might have taken, but he was directed by the Admiralty to go to a particular place, and perform a particular service. He was to go to *Cadix*, and blockade that port—to watch the enemy, and if they attempted to come out, to follow them to any place to which they might fail. He was also to watch a *French* force that was expected to come out of *Ferral*, for the purpose of joining the *Spanish* fleet,—he was to follow that force also, and to endeavour to bring them to action. Here were services enjoined, that might in fair probability have led him far out of the limits of Lord Keith's station, and have entirely prevented all co-operation with him. It is contended, therefore, that Sir J. Saumarez was not sent to reinforce Lord Keith under the terms of the Proclamation, but to perform a special and distinct service under the orders of the Admiralty. As to the orders supposed to be received, it is not averred that there was any communication of general orders, from the vessel taken by Sir J. Saumarez under his command. If it is to be inferred in any manner, that there would be such a communication, it might have been merely as matter of private information, and cannot be considered as a communication from the superior flag officer to him. What is principally relied

lied on, however, is the communication made at *Gibraltar*. But this is no communication of orders from Lord *Keith* to him. They are described as standing orders for the port of *Gibraltar*, and the latter part relates to services to be performed at *Malta* and *Port Mahon*, under the general services of the station, in which Sir *J. Saumarez* could not be employed. He was confined to a particular object by the orders of the Admiralty, and was therefore incapable of executing any orders at *Malta* or *Port Mahon*. They were orders that did not apply to him, and were on that account neglected by him. They cannot therefore be considered as orders, which had such a reference to him, as to bring him under the command of Lord *Keith*. It is said that his own conduct in writing to Lord *Keith*, shews that he thought himself under Lord *Keith*'s command.—By no means. It was a part of his instructions from the Admiralty, that he should so write, as indeed it might be very important that Lord *Keith* should be made acquainted with every disposition of the enemy, even by persons who were not in any degree subject to his command. But if Sir *J. Saumarez* had been under an error as to the precise nature of his situation, and the duties he owed to Lord *Keith*, it will not vary the principle of Law, by which the case is to be governed, on a more mature consideration of all the circumstances applicable to it : It will have no effect to supply that other requisite under the Proclamation, "*That the inferior flag officer should have received orders from his superior.*" It is submitted that no such orders have been received, and that the flag eighth is not due to Lord *Keith* in this case, under the terms of the Proclamation.

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In reply, the King's Advocate and Laurence.—It may be material to point out, What are the particular services which are said to have been imposed on Sir J. Saumarez by the Admiralty, from whence it will appear that they were perfectly consistent and coincident with the general services of the station? Government having received information, which could not be known to Lord Keith, sent this force, not on a *separate service*, but to *reinforce* a particular part of the operations of Lord Keith's station. Sir J. Saumarez was to watch the *French* and *Spanish* fleets, both within the limits of the station, and forming the subject matter of a part of the orders which Lord Keith left behind at *Gibraltar*. This, therefore, cannot be taken as a *new* or *separate service*; it had already been made a part of the disposition of Lord Keith's force, and the ships sent under Sir J. Saumarez were designed as a particular reinforcement for that purpose. How does Sir J. Saumarez act on his arrival at *Gibraltar*? He supercedes the Officer left in command there by Lord Keith, and takes the *Calpe*, a part of Lord Keith's force, away with him, but not out of the limits of the station. He received the general orders, which were not, as it has been described, orders for *Malta* and *Port Mahon*, but orders for the general service of the station, of which this very object of blockading *Cadiz* formed a material part. These will fully answer the words of the Proclamation, which seem to be framed studiously with great latitude, as meaning, no doubt, to infer that any sort of actual communication from the superior flag-officer would be sufficient. The limits of this station appear to have extended from *Cape Finisterre* to *Cape le Gat*. In what a situation then would the commanding officer be, as to his interest in the flag-
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eighth, if it could be held that the orders to be given must be directed specifically and individually to each inferior flag-officer, that should be sent out to join the general operations, at what may be called the head quarters of the station.

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Sir William Scott.—This question turns on the interpretation of that passage of the proclamation, which directs, that “when an inferior flag-officer is sent out to reinforce a superior flag-officer, the superior flag-officer shall have no right to any share of prizes taken by the inferior flag-officer before the inferior flag-officer shall arrive within the limits of the command of the superior flag-officer, and actually receive some order from him.” In this case, I think, it is not denied, that Lord *Keith* was Commander in Chief on the *Mediterranean* station, and that Sir *James Saumarez* was sent out for the general Purpose of reinforcing him, because the words of the order were, “to put himself under Lord *Keith*’s command;” it is certainly not necessary that the word *reinforce* should be used; it is sufficient, I conceive, if an inferior officer is directed to put himself under the command of his superior for the purposes of general co-operation. The mere arrival alone, however, is not sufficient; another requisite circumstance is, that he should have received some orders from the Commander on the station. The terms of the proclamation are very general, “*some orders;*” but there must be *some*, by which the authority of the Commander in Chief over this particular part of his Force is shewn to have vested in him. It is certainly true, that, besides the general service of *reinforcing*, the inferior officer may have a distinct and separate service con-

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sided to him by the Admiralty, which, though to be performed within the limits of the station, may not be connected with the general purposes for which the Commander of the station is employed. This is a possible thing; but it would require, I think, a strong case, to shew that a distinct and separate service was intended; the presumption being undoubtedly, that, where a service is to be performed within the limits of a station, it is co-incident with the general services on which the Commander in Chief is employed, usually, with a very large discretion, as to the means of annoying the enemy with the best effect. In this case, there are orders given by the Admiralty; and the question to be considered is, Whether they are of a nature to take the officer, entrusted with them, out of *the effect of this presumption*, and to detach him from the force, with which on general grounds he must be supposed to be associated. I cannot say that they appear to me to be of that kind. The *Mediterranean* station was of very wide extent, comprehending services very miscellaneous in their nature, and of great importance. If orders were given to Sir J. Saumarez respecting the blockade of *Cadiz*, and respecting his co-operation with the allied fleet of *Portugal*, it is not necessarily a distinct and separate service, with which Lord *Keith* had nothing to do, and which kept Sir J. Saumarez in a state of emancipation from him; since these were services on which part of Lord *Keith's* force was then operating. The terms of the orders to Sir J. Saumarez are "*to invigorate the blockade of Cadiz*," which Lord *Keith's* force was then keeping up. Sir J. Saumarez came within the limits of the station: he heard of an enemy's squadron in *Algeiras Bay*, and attacked them, but unsuccessfully, and went to *Gibraltar* to refit, which was the

the principal port of the station, and might be called almost the head quarters of the Commander in Chief. When he was there, he received orders from Lord *Keith*, but it is said that he did not read them. Certainly, this Court can never admit an averment that the inferior officer had not read orders that were directed to him, and were delivered to him by his superior. Indeed, I cannot but observe, that Sir *James Saumarez* speaks with some uncertainty on this fact, which I am inclined to think did happen, though it may have escaped his recollection. He says, "that he did not interfere with the Marine department, *"because he was otherwise employed,"* not because he conceived that he had no authority, but because his other duties prevented him: not that the orders respecting them did not apply to him, but because he had a justifying excuse for not attending to them. The orders were general, and not confined to the first officer that might arrive, but extending to all in succession, who might come to put themselves under Lord *Keith's* command. Then what is there that does not bring this case within the words of the Proclamation? Here is an inferior officer sent out to *reinforce*, for so I consider this special service, as being within the general services of the station. He was to put himself under the command of the superior officer, to assist in the blockade of *Cadiz*. He had *arrived*, and *received orders*, which did in part apply to the particular service, with which Sir *J. Saumarez* is said to be specially entrusted by the Admiralty, the blockade of *Cadiz*; and the prize in question is a vessel which had escaped from the blockading force. Orders of a more general nature would, I apprehend, have been sufficient; since all that would be required is some exercise of authority

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authority, to shew that the relation subsisting between a Commander in Chief and the subordinate parts of his force had actually attached. Here is an exercise of authority connected with the very service to be performed. Upon the whole of this case, I am of opinion, that it does fall within the words of the Proclamation, and that Lord *Keith* is entitled to his flag-share.

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THE TOBAGO, DE WITTE.

Bottomry, on an enemy's ship, is not an interest that can support a claim in a Prize Court, on behalf of the bond-holder.

THIS was a case of a claim, on behalf of *A. B.* a *British* merchant, for the interest of a bottomree bond executed to him by the master of the ship, being a *French* vessel, previous to hostilities.

Against the demand, the King's Advocate and Robinson.—This claim is entirely unprecedented in practice, and is on various grounds wholly unsustainable. In the first place it might be questioned, how far the contingency on which all bonds of this kind depend, the safe arrival of the ship itself, can be said to have taken place. The bond is made suitable against the vessel, as the property of the owner, on her arrival in the port of *Dunkirk*, or any other port. Here a hostile seizure has intervened, which has *jure belli* superseded the former title of property, and has prevented the vessel from entering, as a voluntary act of her own, either *Dunkirk* or any other port. There has not been such an arrival, as would support the ordinary liens of freight or wages as between the original

ginal parties; by parity of reason, this *security* also, depending on the safe arrival of the vessel, must be extinguished by capture with other liens. But if it is considered only on the ground of property, it is a general maxim of all laws, ancient and modern, that a thing pledged still remains the property of the debtor, *Pignus in bonis debitoris permanere, ideoque ipsi perire, non dubium est.* And in the practice of all systems of jurisprudence, the interference of a Court of Justice is necessary to appropriate the pledge to the creditor, and convert the property. How then under this instrument merely can a substantive title of property be averred, which is necessary to support a claim in a Prize Court? That it is not supposed to constitute property, will farther appear from considering what would be the case, if the interests in such a transaction were inverted. Suppose a bond of this nature given upon a neutral ship, and to a person now become *an enemy*, could a proceeding of prize be instituted against the neutral ship, or any part of it, as the property of the enemy? Certainly not. The consequence of admitting claims for such interests, on behalf of a *neutral* bondholder, whilst they would not be amenable to capture, in the hands of an enemy, would be to constitute a species of property which could in no case be subject to the rights of war—and that carved out of a description of property, which is, in its own nature, most exposed to the events of war. But, farther, if it *could be* considered as the property of the claimants, in what situation would it be placed?—at least under the flag and pass of the belligerent nation, subject to his controul and management, and convertible by him as occasion might be, even to the operations of war. Such a mode of qualifying the immediate and ostensible interests

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interests in a ship would afford a most convenient cover to conceal the property of the enemy; and so mischievous would be the consequence of holding such interests to be protected from the rights of war, that even if all other objections could be removed, it would be necessary to hold such property in the hands and possession of the enemy, liable to confiscation. On every ground this is an interest that cannot be restored, but must follow the fate of the subject matter, on which it was engrafted.

On the other side, Laurence and Adams.—As to the dangerous consequences that are apprehended from claims of this nature, it must be recollected, that such interests can arise only out of circumstances of distress, and therefore they are not very liable to abuse, nor likely to be set up in fraud of belligerent rights. Still less is this danger to be apprehended from claims like the present, which is built on an event antecedent to the war, and independent of all contemplation of war. The objection cannot be sustained, therefore, on the ground of the fraudulent *motives* that led to this transaction, nor of the consequences likely to ensue, from admitting claims of this nature, which will at all times be liable to be strictly examined with reference to their own particular circumstances. The claimant in this case, being a *British* subject, has lent his money on an ordinary event of commerce, happening in time of peace, for the protection of property now fallen to the captor; he now solicits the aid of this Court, as his only remedy against a total loss. Then, as to the legal effect of such bonds—they are introduced for the benefit of navigation, and for the security of the lender, and are with that view held

to constitute a *lien* so strong, that they supersede all other demands on the ship. That the ship had not arrived, is but an objection in words; for if the interest in the vessel can be considered as a neutral interest, the old maxim, that capture is delivery, would apply to protect all such demands. It is, besides, an objection proceeding only from the act of the captor, who prevented the regular arrival, and can therefore not derive any benefit from a defect proceeding only from his own act. Captors are held to take, *cum onere*; they put themselves in the place of the enemy, and are liable to the burthens attaching on the property in the course of navigation, in which it is seized. With regard to the case put of an enemy's interest of this description, on a neutral ship, the distinction is obvious, that this interest is a thing accessorial only to the ship; and that it might well consist with the principles of justice, that the accessory might be restored, though the ship was condemned; at the same time that it would not be reasonable or just to seize the ship itself, on account of such an accessorial interest, which an enemy might possess in it.

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Sir William Scott.—The integrity of this transaction is not impeached, but I am called upon to consider, Whether the Court can consistently, with the principles of law that govern its practice, afford relief. It is the case of a bottomree bond given fairly in time of peace, without any view of infringing the rights of war, to relieve a ship in distress—a contract certainly regarded with great attention and tenderness by this Court, when brought immediately before it. But can the Court recognize bonds of this kind as titles of property, so as

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to give persons a right to stand in judgment, and demand restitution of such interests in a Court of Prize? The total silence of those who have argued for the claimant, as to any precedents for this demand, strongly shews that it has not been the practice of the Court to consider such bonds as property, entitled to its protection; and I think I may venture to say that there has been no such instance. The person advancing *money on bonds of this nature*, acquires by that act no property in *the vessel*; he acquires the *jus in rem*, but not the *jus in re*, until it has been converted and appropriated by the final process of a Court of Justice. The property of the vessel continues in the former proprietor, who has given a right of action against it, but nothing more. If there is no change of property, there can be no change of national character. Those lending money on such security, take this security subject to all the chances incident to it, and amongst the rest, the chances of war. But it is said, that the captor takes *cum onere*; and therefore that this obligation would devolve upon him. That he is held to take *cum onere* is undoubtedly true, as a rule which is to be understood to apply, where the *onus* is immediately and visibly incumbent upon it. A captor who takes the cargo of an enemy on board the ship of a friend, takes it liable to the freight due to the owner of the ship; because the owner of the Ship has the cargo in his possession, subject to that demand by the general law, independent of all contract. By that law he is not bound to part with it but on payment of freight; he being in possession can detain it by his own authority, and wants not the aid of any Court for that purpose. These are all characters of the *jus in re*—of an interest directly and visibly residing in the substance of

of the thing itself. But it is a proposition of a much wider extent, which affirms that a mere right of action is entitled to the same favourable consideration, in its transfer from the neutral to a captor. It is very obvious that claims of such a nature may be so framed, as that no powers belonging to this Court can enable it to examine them with effect. They are private contracts passing between parties who may have an interest in colluding; the captor has no access whatever to the original private understanding of the parties in forming such contracts; and it is therefore unfit that he should be affected by them. His rights of capture act upon the property, without regard to secret liens possessed by third parties: In like manner his rights operate on no such liens, where the property itself is protected from capture. Indeed it would be almost impossible for the captor to discover such liens in the possession of the enemy, upon property belonging to a neutral; the consequence therefore of allowing generally the privilege here claimed would be, that the captor would be subject to the disadvantage of having neutral liens set up to defeat his claims upon hostile property, whilst he could never entitle himself to any advantage, from hostile liens upon neutral property: This Court therefore excludes all consideration of liens or incumbrances of this species. On the whole, I am of opinion, that there is no instance in which the Court has recognized bonds of this kind, as titles of property, and that they are not entitled to be recognized as such in the Prize Court, however much the Court of Admiralty may be disposed to uphold them in the other branch of its jurisdiction, when they are brought directly before it.

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THE PEARL, DENTON.
(Instance Court.)

Wages for a run
to Hull forfeited
by leaving the
ship in the *Humber*
before her
arrival at the
port of Hull.

THIS was a suit for wages, on a hiring of certain mariners for a run from the *Downs* to *Hull*; in which the defence set up was, that the mariners had quitted the vessel before the voyage specified in the contract was completed.

The King's Advocate and Laurence.—This is a case of much importance in principle, and particularly to the ship owners of the port of *Hull*. It appears that these mariners were hired by the master in the *Downs*, for the run to *Hull*, at twelve guineas per man, and that they were in fact only three days occupied in that navigation. When the ship arrived in the *Humber*, the port of *Hull* was so full that the vessel could not enter immediately, and the master was induced to come to anchor in the Roadstead, near to the Old Garrison, where these men insisted on quitting the ship, as having completed their voyage. On the contrary, the owners maintain, that the mere anchoring in that Roadstead is not an arrival in the port of *Hull*; that, in fact, vessels are often lost there; and that a distinction has always prevailed in the trade of *Hull*, of not paying wages until the vessel is actually within the port. Under the general principles of the maritime law, the legal consequence of desertion, in wilfully quitting the services of the ship, before her arrival in port, is the forfeiture of wages. The existence and expediency of such a law are so generally recognized,
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that it is unnecessary to enter into any argument on that point. The case resolves itself rather into two questions of fact. Whether an arrival in the *Humber*, or in this Roadstead more particularly, can be deemed in law an arrival in the port of *Hull*; secondly, whether these men did not wilfully quit the services of the vessel without leave, and contrary to the express notice given to them by the owners. On the first point it is evident, *ex vi termini*, that an arrival in the *Humber* is not an arrival in the port of *Hull*. None of the effects of *arrival* could be attributed to such an anchoring, not in the port of *Hull*, nor even in the river of *Hull*, but in the *Humber*. It is certified that it would not have been a valid arrival for any purpose of insurance, and that it was a known practice in the trade of *Hull*, not to consider the arrival off this point to be an arrival in port. It is also proved that the owners warned the mariners not to leave the ship; indeed, the mariners themselves offered to remit a guinea of their wages, or to hire others, which is an admission that they had not discharged the whole of their duty. As these facts are established beyond contradiction, the Court will perceive the importance of the general principle to the trade of *Hull*, and feel the necessity of enforcing the provisions of the law, by pronouncing that these men have incurred the forfeiture of their whole wages.

On the other side, Swabey.—The terms of the agreement in this case were for a run from the *Downs* to *Hull*. These men made no part of the original crew, but were taken up in the *Downs*, to supply a mere occasional assistance; they were no parties to the ship's

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articles, and though the original crew might be obliged, by the nature of their engagement, to assist in the un-livery, it does not follow, nor does it appear to be the meaning of the terms of their contract, that these persons so picked up, should be detained for such purposes. They were hired for a run to *Hull*; and it is no immaterial circumstance in their favour that, on their arrival in this Roadstead, which is about half a mile from the port of *Hull*, the master thought that *they were* entitled to their discharge, and exerted himself to procure their wages for them. There was no unwillingness on their part to have brought the vessel into port, but the port was full, and could not receive them. This was a circumstance entirely out of their contemplation at the time of hiring, and if it can be urged in any degree as sufficient to protract their obligation, it might be carried to an extent of evident injustice, if it could be supposed that they were bound to wait any length of time, in attendance on the vessel, without being entitled to additional remuneration. The act which is imputed to them is certainly not to be classed with ordinary cases of desertion, since they did not quit the vessel without the consent of the master, and were supported in *their* construction of the contract by him, who cannot be supposed to have been unacquainted with the customs of the port of *Hull*. It is not such an act as can be held to draw on it the penalty of wilful desertion. On the contrary, the terms of the contract are to be taken as fulfilled, so as to entitle these men to their whole wages.

JUDGMENT.

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Sir William Scott.—In order to maintain a claim of this kind, a mariner must prove one of two points, either the performance of the contract, or that some circumstance had intervened, which would equitably discharge him from the obligation of the contract, and continue to him the benefit of a legal and virtual performance. The present contract was made by the master in the *Downs*, for the advantage of his owners, and if the port of *Hull* had not been mentioned, the construction must, I think, have been the same, because it is not the *Humber*, which may in popular language be sometimes called *Hull*, but the port which is to be understood as the *terminus ad quem* of the destination, and as the place where the ship is expected to be moored in safety. If *Hull* only had been described, I think the legal interpretation must have been the same. But the terms of the contract are *the port of Hull*, which, it is admitted, and indeed cannot be denied, is not the *Humber*. For the purposes of the Customs, the *Humber* may, perhaps, be considered as the port of *Hull*, but not for other purposes connected with the general interests of navigation. It is, in fact, a place in which the vessel would continue to be very much exposed to all the accidents of the voyage; and, I conceive, the fact may be as it is represented, that insurers would not be released from their engagement by such an arrival. Sailors are not usually discharged there; and it affords no inference to the contrary, that in this instance the *sea pilot* had been discharged, as is not unusual on entering a *river*, though such entrance is no termination of the voyage. That circum-

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stance would not prove more than that the sea voyage was at an end; which may be, though, if the port lies far up the river, a river pilot may be still necessary for the completion of the whole voyage. The obligation of mariners is for the whole voyage, in the river as well as at sea; and if the port lies high up the river, a very considerable portion of their services may remain to be performed in the river. On the first point, therefore, I am of opinion that the claim cannot be supported on the mere legal grounds of the absolute conclusion of the voyage. Then, to support their demand, we must resort to equitable grounds, and see whether there were any justifying circumstances which prevented their arrival, independent of any failure in performance of duty on their part. It is said that the master gave them his consent, and therefore that this act was not an act of *desertion*, which is described to be the wilful quitting of the ship without the consent of the master. It appears, undoubtedly, that the master did consent as far as he could; but it appears also, I think, that he acted rashly in so doing; and it is to be lamented that he has, perhaps, been the instrument of misleading these men. He was unacquainted with the limits of the port, and with its customs, and therefore he ought to have been very guarded in the opinion that he expressed. But had he any authority to consent, in opposition to the declared will of the owners?—Certainly not. He was not a person interested in the contract, but a mere agent for the benefit of the owners. The owners themselves came on board, and told the mariners that they had not arrived

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in port, and that they were not to be discharged. The master was but their representative in making the contract, and they had a right to insist on the full performance of it. There was a supercession of the master's authority, which, in ordinary cases, where no owner appears, might be sufficient; but in this case, it would not justify the mariners, in opposition to the owners, expressing their direct prohibition, and standing on their legal rights. This excuse, therefore, will not be sufficient. The only other ground is, that the port was so full that the vessel could not enter; though the men were willing to go in. That brings the case to this question—Whether if a vessel cannot enter at the very moment when she comes to the port, the mariners are at liberty to say, “Good bye to you, we are entitled to our wages”—I am of opinion, that such conduct cannot be defended; and that it could not be, till after some time of just expectation of the removal of the difficulty, that they would be entitled to their dismissal. If a ship cannot get in, she is, on that very account, more in need of the services of the crew. If the fact be as it is stated, that the port is too narrow to admit all vessels, it may be, in future, a fit foundation of a special agreement; because, though on one hand it would be too much to say, that if the ship cannot get in the first day, the men shall be discharged; yet, on the other, it may be attended with great hardship to mariners to be detained, if the impediment is likely to train on for any considerable length of time. It might, therefore, be a fit subject of private agreement, as to this port, and others under simi-

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lar circumstances. In this case it appears that there was no such prospect of a lasting impediment. The ship did actually get in within a week; and when it is considered that these men were to receive twelve guineas each for the run, which had only taken up four days, a week's delay does not seem to be too much to fall under the terms of such wages. This is, indeed, in some degree admitted by themselves, in the offer which they made of money to procure substitutes. On the whole case, I feel myself bound to pronounce that the vessel had not arrived, and that the circumstances stated, are not sufficient to justify the mariners in quitting the vessel, in direct opposition to the will of their employers. I will not lay it down indefinitely, that they would be bound to wait any length of time, but that, under the circumstances of this case, they should have waited longer. I think the legal case and the equitable case also, as far as it is affected by legal considerations only, is with the owners. Adverting to the misapprehension that seems to have prevailed on this point, seeing that it is a case very different from malicious desertion, and that the mariners might perhaps be misled by the master, I would wish to recommend their claim to the liberal consideration of their employers. But the sentence which I feel it my duty to pronounce is, that the mariners have failed in their case, and that they are not entitled to their wages.

THE VREEDE, OHLSEN.

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THIS was a case of a claim on farther proof for a parcel of goods taken on a voyage from *Amsterdam* to *Bilboa*, and claimed by a merchant at *Embsen*. In objection to the further proof, it had been contended, that no correspondence had been exhibited with the consignee; that where the claimant appeared to be engaged in a trade not connected with his own port, in either term of it, he ought to clear away the suspicion arising from the increased improbability of such a transaction, by shewing the measures which he had taken for the protection of his interests, in the port of consignment.

Further proof—
Rule as to the
nature of proof
—Correspond-
ence with the
consignee, when
required.

JUDGMENT.

Sir William Scott.—The general rule has been, that where the shipment is from the port of one enemy to the port of another enemy, a double correspondence should be exhibited, because there is a double interest to be rebutted; where the trade is from the port of the enemy to a neutral port, (a) the correspondence with the shipper is all that is usually required; and I see nothing in this case that should induce the Court to direct a stricter proof that is satisfactory in ordinary cases. With regard to this particular trade, also, I think, the suspicion is much weakened, by considering that *Spain* is not a country of much shipping, and therefore when the ordinary course of supply is interrupted on the part of the *Dutch*, it was not very likely to be taken up wholly by *Spain*, but might be supposed more naturally to engage the attention of neutral merchants.

Objection over-ruled—Restitution.

(a) *Spain* was at the time of this transaction a neutral state.

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THE CATHARINA ELIZABETH, LE GRANGE.

Resistance by an
enemy-master
will not affect
the cargo, being
the property
of a neutral
merchant.

THIS was a case of a claim for goods, as *American* property, on board a *French* vessel, against which it had been contended, amongst other arguments on the proof of property, that there had been a resistance on the part of the master that would expose the whole cargo entrusted to his management to condemnation.

JUDGMENT.

Sir William Scott.—The circumstances of this case cannot, I think, be taken to raise the question respecting the rescue. The ship was a *French* vessel, and the master a *French* man; therefore be his conduct what it may, it would be the conduct of an enemy, and not of a neutral master. The documents are in some parts defective, and may on that account justify a call for farther proof; but beyond this, that there is any ground for condemnation of the cargo, in the conduct of the master, cannot be maintained. It could only be the hostile act of a hostile person, who was prisoner of war, and who, unless under parole, had a perfect right to attempt to emancipate himself by seizing his own vessel. If a *neutral master* attempts a rescue, he violates a duty, which is imposed upon him by the law of nations, to submit to come in for enquiry, as to the property of the ship or cargo; and if he violates that obligation by a recurrence to force, the consequence will undoubtedly reach the property of his owner; and it would, I think, extend also to the confiscation of the whole cargo entrusted to his care, and thus fraudulently attempted to be withdrawn from the rights of war. With an enemy master, the
case

case is very different: No duty is violated by such an act on his part—*lupum auribus teneo*, and if he can withdraw himself, he has a right so to do. But a material fact in this case is, that the master did not attempt to withdraw this property; he seized the *ship of the captor*, and not this vessel. The case being clear, then, of that question, as to the rescue, it is merely a case for farther proof, and if the goods are shewn to be *American* property, they must be restored.

The
CATHARINA
ELIZABETH.

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BOEDES LUST, SYBRANDS.

July 24th,
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THIS was the case of a claim given for property belonging to persons resident at *Demarara*, on a suggestion that they were at the time of seizure, and of adjudication, *not* enemies of the Crown of *Great Britain*.

National character of persons settled in *Demarara*, during *British* possession, as to property taken before the declaration of *Dutch* hostilities, 16th June, in 1793.

On the part of the Captors, the King's Advocate, Swabey, and Parsons.—This property was seized 19 May, 1803, after the order for the detention and seizure of all *Dutch* property. It is not averred on the part of the claimant, that he settled in *Demarara* during the time of *British* possession, so as to bring him within the range of the principle which the Court laid down in the Case of the *Diana*. (a) Neither is it attempted to be shewn, that at the time of capture, the claimant had manifested by any overt act an intention of quitting the colony. Much property in the situation of this claim has been condemned since the commencement of the war; and it seems entirely to have escaped the Counsel and the Court, that there

(a) *Supra*, page 69.

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was any ground for restitution. Such a claim is therefore not only unprecedented, but in opposition to the practice which has prevailed, from which some inference at least arises against the soundness of the pretensions on which it is built. It is now, however, brought forward for solemn argument on this ground, that the claimant was not an *enemy* either at the time of sailing, or at the time of capture, or at the time of adjudication. With regard to the first point, it is certainly not necessary that property, to become good prize, should be the property of the enemy at the time of sailing. If so, every thing found upon the seas at the breaking out of hostilities, though belonging to the enemy, would be protected. 2dly. It is not necessary that it should be the property of the enemy at the time of seizure; for if so, no property seized under *embargo* could be condemned. 3dly. It is not necessary that it should be the property of the enemy at the time of adjudication; because, if that could be maintained, the goods of all persons who were enemies at the time of capture, but had become subjects by conquest before adjudication, must be restored, which is contrary to the established principle of the (a) *Negotie en Zee-vart*, the *Danbetar African*, (b) and that whole class of cases. It is, however, of less importance to dwell on this point, since the fallacy of the pretension seems to lie in confounding the fact, and in considering the time of detention only as the time of legal capture. On the contrary, the first seizure in this instance, being only provisional, the rights of war must be taken to have attached on the property, at the moment of actual hostilities against *Holland*. The rights of his Majesty ac-

(a) Vol. I. p. 107.

(b) Ibid.

crued at that instant, and are not to be divested by any subsequent character which the claimant may acquire. If the original detention had been merely accidental, and not arising out of any prospect of war, this change of character would have ensued as a necessary consequence of law. In the present case, this conversion is more immediately pointed out by the directions given by the Crown for the seizure. The first possession was of a hostile nature, and if the right of property remained in any manner in ambiguity, till the declaration of hostilities, at that instant the right of the Crown attached upon it, as upon the property of an enemy, and could not be divested by the intervention of any change of character that might take place previous to adjudication. On this principle, the cases of the *Ne- U. supra.* *gotie en Zeevart*, and the *Danhetar African*, are precisely in point. The latter was still stronger, since in that case the capture was not made till after the proprietor had become a *British* subject by *capitulation*.

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On the other side, *Arnold, Laurence, and Robinson*.
 The plea on the part of the claimant is, that under all the circumstances of this case, he is entitled to restitution. It may not be improper to state briefly, therefore, what the Situation of the Claimant *was*, previous to the actual Seizure, and *what it is* at this present time of adjudication. It appears that till *December 1803*, the inhabitants of *Demerara* had continued *British* subjects, as the colony had not been before that time surrendered to the *Dutch* under the Treaty of *Amiens*. The property in question was shipped in *January* and *February 1804*, and was the produce of the cultivation of the island during the time of *British* possession. The ship sailed in *March*, and was captured on the 19th

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19th of *May*, a month before the declaration of war against *Holland*. The property was neutral at the time of sailing, and it would have continued neutral, if it had gone on to the place of its destination. At this present moment of adjudication, the claimants are become *British* Subjects. At all the periods, therefore, to which the averment of property is required to point in the affidavit of claim, and in the test affidavit, the claimant may conscientiously aver, "that it was his property, at the time of sailing and seizure, that it would have been his property if it had arrived and been delivered at the place of destination, that it now is his property, and that it did not, at any of those times, belong to enemies of the Crown of *Great Britain*, or to persons inhabiting within the territories of the enemy." But the effect of this averment is endeavoured to be avoided, by substituting in the place of the actual seizure another point of time as the time of capture, viz. the moment of the declaration of hostilities. But how does this consist with the general understanding of the practice of the Court? It can hardly be doubted, that in the test affidavit before alluded to, the obvious meaning of the terms is the sense in which they are to be understood. The averment of property, as there introduced, is intended principally to negative the supposition of fraud or collusive transfer, subsequent to the sailing; it is meant to cover the period of the voyage, and therefore in that instrument at least the time of capture is to be taken simply as the time of actual seizure, and not constructively, and with reference to proceedings in this Court, or other subsequent events. It may be said, that that instrument is formed principally with a view to captures in a state of actual war, and therefore

fore that it will not apply to illustrate a question arising under embargo. But the opinion of the Court has been already expressed against the sufficiency of such a constructive meaning. Under the old practice, the form of condemnation ran "as enemy's property *at the time of seizure and adjudication.*" During the last war, when it became necessary to apply the form to property seized under embargo, the Court thinking that the old form did not properly *apply*, and that the terms "*enemy's property at the time of seizure,*" could not be predicated of it in virtue of the declaration of hostilities that afterwards took place, directed the form to be altered to "*the property of persons now become enemies,*" &c. This circumstance shews at least that it was thought desirable that it should appear on the Records of the Court, that at one of these periods, according to their obvious meaning, the property was the property of an enemy. Indeed the fallacy of the argument on the other side seems to lie in arguing, that because neither period is separately necessary, therefore *no one of them is necessary.* But suppose the same reasoning should be carried on to all other times, precedent and subsequent, then the argument would be, that because it could not be said to be necessary to be shewn that it was the property of an enemy at any one precise moment, therefore it was not necessary that it should have been so at any time whatever. On the contrary, it seems to have been thought sufficient hitherto in the administration of prize law, to give the captors the chances of the tables, as it may be called, so that if at one of several times, the property can be shewn to belong to the enemy, it would be sufficient; but *so much* has always been

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been required, and no case can be produced in which condemnation has passed otherwise. The cases that have been cited by no means contradict this assertion. In the *Negotie en Zeevaart*, the declaration of hostilities had been previous to the *sailing of the vessel*, and the principle decided was, that the impression of enemy's character could not be removed *in transitu*, not even by an intermediate capitulation. In this case, up to the moment when the vessel was seized, there had been no enemy's character imposed, and if at that moment the case had been brought to adjudication, on what principle could it have been denied that the claimant would have been entitled to restitution. The *Negotie en Zeevaart*, therefore, stood on a principle which is not raised by the facts of this case. The *Danbetar African* stood upon the same ground, supported by the particular *circumstances* preceding the late hostilities with *Holland*. The state of *Holland* was pronounced to have been *hostile* at the time of sailing, *May 1795*, and the express words of the sentence were, that the subsequent declaration of hostilities in *September 1795*, as applied to the ambiguous state of affairs for several months preceding, must be construed to have a retro-active operation. This construction was, indeed, justly raised by the words of the declaration of hostilities, which began by reciting, "that whereas, for several months, the *French* have been in possession of *Holland*," &c. Here no such state of ambiguity had preceded. The relation of the two countries was a state of clear amity till the 16th of *June*. In such a case, the equity of interpretation requires that whatever force is given to the intervention of temporary hostilities, not less effect should be ascribed to the state of amity intervening

vening also before adjudication, to rehabilitate and restore the claimant to his former friendly character; and so material is this distinction against the application of the authority of the *Danquebar Africaine*, that it turns the case in favour of the present claim, as applied to the circumstances on which it is founded. Because in the subsequent case of the *Herstelder*, (a) when the Court came again to advert to the circumstances of the *Danbetar African*, it observed, "that, in that case, the ship sailed before hostilities, and if the state of *Holland* had been in a clear and decided character of amity towards *Great Britain*, I should have held, that the party would have been entitled to restitution, and to the benefit of the principle, that the national character *cannot be changed in transitu*." That is, therefore, a direct declaration in favour of this claim, that the claimant being clearly in amity at the time of sailing, not hostile at seizure, and not debarred from receiving restitution by the character of enemy at the time of adjudication, may be considered as a person entitled to restitution. The whole of the argument on the other side depends on fixing upon one intervening circumstance, which, it is insisted, must apply prospectively as well as retrospectively to defeat every other consideration. Because hostilities have intervened, it is contended, that a right of war has attached, which cannot afterwards be divested. But surely the equity of the principle requires, that if the intervention of hostilities between actual seizure and adjudication, can convert the character of the property, so as to render it liable to be considered as hostile property, the return of character to its neutral state, recurring also on the same intermediate period, should have the effect of *rehabilitation*, and revert the title of property and

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and the capacity to receive restitution, which had been ousted only by construction and by anticipation of the rights of war. Such a latitude may well be allowed till the sentence of adjudication has found the fact, and decided the character in which the claimant is to be considered. Till that is done, all the proceedings are inchoate only, and if the fact fails which they tend to establish, they can have no effect to controul the change of circumstances, and prevent the Court from deciding upon them as they stand in evidence at the time of adjudication. But farther, the whole argument on the side of the captors is built on *construction*, which, if it is admitted as to the point of time, why may it not be extended to the consideration of character also, and entitle the claimant to the benefit of all that constructive reasoning on which the principle of postliminary restitution is founded? The inhabitants of *Demerara* may well claim the liberty of appealing from their political denomination at the time of capture, to their intention of removing themselves from the situation of enemies, and of again incorporating themselves with *Great Britain*. This has been allowed to individuals in the case of Mr. *Curtissos* (a) and others, who have been in the country of the enemy at the time of capture. In those cases it may be said, that some overt act of removal, has been required. That indeed can hardly happen in a case of a colony; but it is immaterial, so long as such an intention can be shewn to be so connected with the contingency of war, as to have followed as a necessary consequence on that event. The situation and conduct of the inhabitants of *Demerara* may well support such a conclusion. In general description

(a) Vol. III.
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scrutions of that settlement, it appear, that the principal plantations were, previous to the last war, in the occupation of *British* planters from the other *British* islands. During a considerable part of the last war they were identified with the *British* empire, and may be supposed to have acquired affections, connections, and habits; which would lead them to put themselves again under the dominion of this country. These presumptions would indeed be nothing, without the fact itself. But the event proved them reasonable, and may be justly put in comparison with any overt act, that can be required or proved on the part of individuals. The war was scarcely known there till the middle of *August*; so soon as the 19th of *September*, without the interposition of any force, the island voluntarily surrendered to this Country, and the inhabitants became again *British* subjects. On these grounds alone, it might not be too much to contend, that the claimants are entitled to the benefit of the Postliminary principle. On the whole case it is submitted, that either the ordinary technical description of neutral character, or the particular claim springing from the relation which the claimants bear to this country, as reintegrated *British* subjects, might be sufficient to support the restitution of this property. But the force of the pretensions of the claim will be materially increased, if it is considered on these grounds jointly, that the person before the Court has complied with all the terms usually required of claimants to shew themselves qualified to restitution, both at the time of seizure and adjudication; that they are moreover persons, who were almost to the eve of capture *British* subjects, exporting the produce of *British* cultivation, and standing here at the time of adjudication,

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restored again by their own voluntary act, upon the first news of hostilities, to their connexion with the *British* empire.

In reply, the King's Advocate, Swabey, and Parsons.—The affidavit of claim is introduced only to defeat fraudulent transfers; all the periods therein stated may be safely predicated in many instances, in which, notwithstanding, the property will be liable to condemnation. Even of these periods there is one, at which the character of enemy most unquestionably attached; viz. at the time of instituting proceedings by taking out the monition. That act is the foundation of the whole enquiry. The evidence introduced to support the proceedings relates to the state of things, *at that time*, and *previous*; and *to that time*, must be referred the retrospective operation of the sentence, which afterwards passes. This would be the legal view in which the effect of a condemnation must be considered, if such a sentence were necessary to vest *the right*, but it cannot be so held; a sentence of condemnation is a measure of convenience declaratory of the fact, but not essential to convert the right of property, which accrues to the King *jure belli*, at the instant of capture. Something has been thrown out as if at the time of capture this property might have been restored; but it is to be remembered that the order for the seizure of *Dutch* property issued *May* the 16th, at the same time with the declaration of war against *France*. After that order, it would have been the duty of the Officer of the Crown in this Court to have resisted restitution, until the conduct of *Holland*, and her disposition, or power to maintain the relations of amity with this Country, during the war with *France*,

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France, should be more fully ascertained, and till farther directions of the Crown on that point should be received. During the uncertain state of affairs between this Country and *Holland*, the first order for seizure was provisionally of a hostile nature; and therefore after all that has been said of the terms of the sentence, there would be no impropriety if the old form was *retained*, and if this property was described as the property of the enemy at the time of seizure. But all the argument from the form of sentence shews only, that the Court is not bound down by any particular form, but that it adapts the sentence to the state of facts, as in the cases of the late war, the sentence was altered, “ *to the property of persons now become enemies, &c.*” The substantial ground of enquiry is—Whether there was not such a hostile character in the first seizure, and confirmed by the declaration of hostilities, as would vest the right in the King, at the time of the commencement of these proceedings. At that moment there could have been no question as to the condemnation. The claimant could have had no *persona standi* before the Court, and the property must have been condemned. Since that time the proceedings have been deferred, to give all parties an opportunity of being heard; but it would be very unreasonable that the right of action should, owing to that indulgence, be altered by the intervention of subsequent events. To one question which has been mooted in argument,—Whether in the case of a seizure before hostilities, in which no proceedings may be supposed to have taken place during the war, the Court would proceed after the return of peace.—The practice of the Court will afford an answer; for in some of the

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cases seized before the late war with *Holland*, and suspended by accident during the war, the Court has granted its monition, and permitted proceedings to be instituted and prosecuted to condemnation since the return of peace. As to the cases which have been commented upon, it is impossible to distinguish them, but to the disadvantage of the present claim. They are stronger in regard to *time*. The *Herstelder* was taken before hostilities, but after a special invitation to all subjects of *Holland*, which has not taken place here. The dictum in the *Herstelder* was spoken of the *Dankebar*, which was not captured till after the claimant had become a *British* subject; yet in that case also, it was held that the character could not be changed *in transitu*.

JUDGMENT.

Sir William Scott.—This case comes on upon the claims of persons resident in *Demarara* before the war, and at the time of capture, and I cannot but say that I am glad that the question has been raised, since it may have the effect of putting an end to much uncertainty on the part of persons who, on various grounds, may think themselves entitled to more favourable considerations, than the rules of law prescribe for ordinary cases. The claim is given for several persons as inhabitants of *Demarara*, not settling there during the time of *British* possession, nor averring an intention of retiring when that possession ceased. They are therefore to be treated under this general view as *Dutch* subjects, unless it can be shewn that there are any other circumstances by which they are protected. It is contended, that there are such circumstances, and that

that they are these: That the property was taken in a state of peace, and that the proprietors are now become *British* subjects, and consequently that this property could not be considered as the property of an enemy, either at the time of capture or adjudication. Now, with respect to the first of these pleas, it must be admitted, that alone would not protect them, because the Court has, without any exception, condemned all other property of *Dutchmen* taken before the war—And upon what ground?—That the declaration had a retroactive effect, applying to all property previously detained, and rendering it liable to be considered as the property of enemies taken in time of war. This property was seized provisionally, an act itself hostile enough in the mere execution, but equivocal as to the effect, and liable to be varied by subsequent events, and by the conduct of the Government of *Holland*. If that conduct had been such as to re-establish the relations of peace, then the seizure, although made with the character of a hostile seizure, would have proved in the event a mere *embargo*, or temporary sequestration. The property would have been restored, as it is usual, at the conclusion of embargoes; a process often resorted to in the practice of nations, for various causes not immediately connected with any expectations of hostility. During the period that this embargo lasted, it is said, that the Court might have restored, but I cannot assent to that observation; because, on due notice of embargoes, this Court is bound to enforce them. It would be a high misprision in this Court, to break them, by re-delivery of possession to the foreign owner of that property, which the Crown had directed to be seized and detained for farther

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ders. The Court acting in pursuance of the general orders of the State, and bound by those general orders, would be guilty of no denial of justice, in refusing to decree restitution in such a case, for it has not the power to restore. Its functions are suspended by a binding authority, and if any injustice is done, that is an account to be settled between the States. The Court has no responsibility, for it has no ability to act.

This was the state of the first seizure. It was at first equivocal; and if the matter in dispute had terminated in reconciliation, the seizure would have been converted into a mere civil embargo, so terminated. That would have been the retroactive effect of that course of circumstances. On the contrary, if the transactions end in hostility, the retroactive effect is directly the other way. It impresses the direct hostile character upon the original seizure. It is declared to be *no embargo*, it is no longer an equivocal act, subject to two interpretations; there is a declaration of the *animus*, by which it was done, that it was *done hostili animo*, and is to be considered as an hostile measure *ab initio*. The property taken is liable to be used as the property of persons, trespassers *ab initio*, and guilty of injuries, which they have refused to redeem by any amicable alteration of their measures. This is the necessary course, if no particular compact intervenes for the restitution of such property taken before a formal declaration of hostilities. No such convention is set up on either side, and the State, by directing proceedings against this property for condemnation, has signified a contrary intention. Accordingly the general mass of *Dutch* property has been condemned on this retroactive effect; and *this* property

perty stands upon the same footing as to the seizure, for it was seized at the same time, and with the same intent. There is no ground of distinguishing the time of seizure, between these claims and former cases of a similar nature; it was a provisional seizure in all, declared to be hostile by subsequent events, acting in a reflex manner upon all the property then seized, and declaring it to be *all* enemy's property, unless some circumstances can be shewn to take these particular claims out of the common operation.

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At the time of the declaration of hostilities, then, this property stood exactly on the common footing; and the result of any proceeding then pronounced, must have been a sentence of condemnation: It lay open to the same legal conclusion at that time, but the Settlement has since surrendered to the *British* arms, and the parties are become *British* subjects; and this, it is said, takes off the hostile effect, although it might have attached. This argument, to be effective, must be put in one of these two ways, either that the condemnation pronounced upon *Dutch* property went upon the ground that, though seized in time of neutrality, it could not be restored *only*, because the parties were not now in a condition to receive it; or else, that though seized at a time, that may to some effects be considered as time of war, yet the subjects, having become friends, are entitled to restitution. This latter position cannot be maintained for a moment. It is contradicted by all experience and practice, even in the case of those who had an original *British* character. In the case of Mr. *Whitehead*, who had but just set his foot on the colony of an enemy for a few hours, but was proved to have gone there for the purpose of set-

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ting, his property was condemned, although at the time of adjudication he was again become a *British* subject, by the surrender of *St. Eustatius* to the *British* forces; and where property is taken in a state of hostility, the universal practice has ever been to hold it subject to condemnation, although the claimants may have become friends and subjects prior to the adjudication. The plea of having again become *British* subjects, therefore, will not relieve them, and the other ground must be resorted to. That is equally untenable in point of fact; for the condemnation of the other *Dutch* property proceeded on no such ground as the mere incapacity of the proprietors to receive restitution. It proceeded on the other ground, which I have before mentioned, the retroactive effect of the declaration, which rendered their property liable to be treated as the property of enemies at the time of seizure. The reasonings of the Court have been founded upon that principle. Property is, indeed, frequently condemned upon the other ground of incapacity to claim, where it is accidentally found in *British* possession, before the breaking out of hostilities; but where it is seized by an order of state, acting provisionally in contemplation of hostilities, the declaration produces something more than a prospective, future, personal incapacity to claim. It decides upon the character of the property already seized, and on the nature and quality of the seizure. I am of opinion, therefore, that when it is assumed, that the capture is legally to be considered as made in time of peace, the argument legally fails, because in all legal view of the matter, it is taken in hostility; it is rendered enemy's property at the time of seizure, by the

the necessary and general retroaction of the subsequent declaration of hostilities. The whole foundation of the argument, therefore, is defective in the fact. We distinguish, it is true, as between the different interests to which such prize enures, whether it is taken before or after the declaration. That is a matter of subsequent and domestic regulation, but not influencing the general question of prize. If I am right in this opinion, it is quite unnecessary to discuss many questions which have entered into the debate; Whether the description of property comes within the periods of the test affidavit or not, will be perfectly immaterial. Nothing is more clear to my apprehension, than that the reference to those periods is not prescribed as the constituent and the distinguishing qualification of property, but merely for the purpose of ascertaining a clearer view of the general facts respecting that property—For instance, as to the first periods, the time of shipment, no body can suppose, that the time of shipment can be there introduced for any other purpose than that of bringing out the whole detail of facts, it being perfectly clear that it is in no degree necessary, that it should be enemy's property at the time of shipment, to subject it to condemnation. It is equally immaterial to look to the style of the sentence, for that has accommodated itself according to the discretion of the Court, to correspond with the facts. The Court is under no necessity of referring to any period of time, in the descriptive language applying to the property or to the parties. If the Court is legally satisfied that it is liable to be condemned as enemy's property, there is no occasion to express in the construction

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struction of the sentence, the particular time at which the liability attached.

With as little effect can it be contended, that a Postliminium can be attributed to these parties. Here is no return to the original character, on which only a *jus postliminii* can be raised. The original character, at the time of seizure and immediately prior to the hostility which has intervened, was *Dutch*. The present character which the events of war have produced, is that of *British* subjects; and though the *British* subject might under circumstances acquire the *jus postliminii* upon the resumption of *his native* character, it never can be considered that the same privilege accrues upon the acquisition of a character totally new and foreign. As to more popular topics to which recourse has been had, I shall leave them to their operation in that quarter, where only they can have a proper effect. It is my duty, in the present case, to apply the principles of a law not very lenient. How far it may be proper to relax the rigour of such an application, will be best considered by those who have more latitude of judgment, as well as a wider sphere of political information and knowledge. It may be fit in that ultimate and superior consideration, to refer still farther back to the former condition of the Claimants, as *British* subjects, during a considerable period of the late war, and down to a time but shortly antecedent to the shipment of these goods. It may be fit to look to the affections and dispositions of the colony; though every surrender of war must be legally considered as the effect of mere force. It may be fit to consider that the property belongs to those, who are now entitled

to the character of *British* subjects. These considerations may have their separate, or their united influence upon that ultimate judgment to which the law refers the disposal of property captured prior to hostilities. They could only mislead me, from the execution of my duty, which is simply to pronounce that the property, at the time of the capture, belonged to subjects of the *Batavian* Republic, and is as such or otherwise liable to confiscation.

The
Boarders *Luvr.*

July 24th,
1804.

THE ABBY, MURCHY.

July 26th,
1804.

THIS was a case of a ship belonging to Mr. *Dawson*, a *British* subject, that had sailed from *Liverpool* to the coast of *Africa*, on the 11th *September* 1795, with an ulterior destination to the island of *Demarara*. On the voyage to the *West-Indies*, she was captured and carried into *Martinique*, and proceeded against, first in the Prize Court, but afterwards by libel, in the Revenue Court of Admiralty, for a violation of the Navigation Laws. On this proceeding the vessel was condemned. On appeal it was found that the Vice-Admiralty Court of *Martinique* had no jurisdiction, over an offence committed in violation of the Revenue Laws, in another island. But at the time when the cause would have been remitted to await the issue of the prize proceedings that had been instituted, the Vice-Admiralty Court of *Martinique* was abolished. The cause was now brought to the High Court of Admiralty, on a suggestion that the ship was subject to condemnation in the Prize Court, as a *British* ship taken in a trade with the colony of the enemy.

Trade with the enemy, on an adventure originating before the war, but not stopped on notice of hostilities—Imputation removed by the *Portus ad quem*, becoming *British* before the arrival of the vessel.

On

The
Adm.

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On the part of the claimant, Laurence contended That the Court had no jurisdiction—That the prize suit had been instituted and abandoned, and therefore that it was on that point a *res adjudicata*—That as to the revenue suit, *that* had been pronounced a nullity, and therefore if it was taken up again, it must commence *de novo* as an original suit; whereas the jurisdiction of the High Court of Admiralty, as to the offences against the revenue laws in the *West Indies*, was only an appellate jurisdiction. 2dly, It was contended, as to the merits of the prize question, that it could not be deemed a trading with the enemy, since the ship sailed before the breaking out hostilities against *Holland*, and before the parties could have any knowledge of that event; and that at the supposed time of arrival, *Demarara* had become a *British* settlement.

JUDGMENT.

Sir William Scott.—The question arises on the property of *Mr. Dawson*, who fitted out this vessel for a voyage to *Africa*, there to barter her cargo for slaves, and then to carry them to the island of *Demarara*, at that time a *Dutch* colony. The vessel sailed on the 11th of *September 1795*. At that time, and until the declaration of hostilities, which issued on the 16th of that month, *Demarara* could not be considered as the colony of the enemy; it would be impossible for me to say, therefore, that it was an illegal trade at that time, as a trade to the colony of the enemy, because there was no state of hostility. The order for the detention of *Dutch* property had passed indeed, but that was an equivocal act, which might terminate amicably, and cannot be taken as fixing on the party an intention

intention of trading with a declared enemy. Soon after the sailing of the vessel, the declaration of hostilities took place, viz. on the 16th of September 1795; and if the ship had been taken on a voyage to a colony now become an Enemy, the Court would have required it to be shewn, that due diligence had been used to alter the voyage, and to exonerate the claimant from the charge of an illegal trading with the enemy. The vessel sailed from the coast of *Africa*, in May 1796, and was taken off the island of *Demarara*, after the surrender of that island to the *British* forces, and carried to *Martinique*. There the proceedings were first instituted in the Prize Court, though, it does not clearly appear on what grounds; during those proceedings a libel was given, as in a revenue cause, the prize suit was suspended, and the ship was condemned for a breach of the revenue laws. The case came up on appeal before the Privy Council, where it was found that the former proceedings in *Martinique* were a nullity, as the Vice-Admiralty Court of that island had no jurisdiction over a breach of the revenue laws committed in another colony. The regular mode would then have been to have sent back the cause to the Prize Court, where proceedings had first been instituted, but that Court was annihilated. The case was therefore brought before this Court, as it has been done in two or three instances (a) of a similar nature, where it has become necessary to carry into effect the proceedings of Vice-Admiralty Courts that have been abolished. It is now objected to the claim, that the party has stated himself out of court on two grounds: 1st, On the ground of trading with the enemy if *Demarara* was a *Dutch* colony, and on the ground of an illegal importation

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(a) Picinemo,
vol. iv. p. 360.

The
ABBY.

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importation if that island was to be considered as a *British* settlement. With regard to the first objection, I conceive that there must be an *act of trading to the Enemy Country*, as well as the intention. There must be, if I may so speak, a legal as well as a moral illegality. If a man fires a gun at sea, intending to kill an *Englishman*, which would be legal murder, and by accident does not kill an *Englishman*, but an enemy, the moral guilt is the same, but the legal effect is different. The accident has turned up in his favor—the criminal act intended has not been committed, and the man is innocent of the legal offence. So, if the intent was to trade with an enemy (which, I have already observed, cannot be ascribed to the party at the commencement of the voyage, when hostilities were not yet declared), but at the time of carrying the design into effect the person is become not an enemy, the intention here wants the *corpus delicti*. No case has been produced in which a mere *intention to trade* with the enemy's country, contradicted by the fact of its not being an enemy's country, has enured to condemnation. Where a country is known to be hostile, the commencement of a voyage towards that country may be a sufficient act of illegality; but where the voyage is undertaken without that knowledge, the subsequent event of hostility will have no such effect. On principle, I am of opinion, that the party is free from the charge of illegal trading. Then, as to the other ground, there appears to me to have been neither *intention nor act*. The former supposition of *Demerara* being a foreign colony, rebuts the intention of importing into a *British* colony, in a manner not authorized by law. Indeed the instructions of the master "*were to call at Demerara for orders,*" which orders

orders must have been, *not to deliver there* according to the first design, but to go elsewhere, since the facts on which the speculation was founded had entirely failed; those facts being, that the colony was a *Dutch* (a) and neutral colony. There was in fact no actual importation; nor was this, as far as I can perceive, made the ground of condemnation in the Court of *Martinique*, since the sentence seems to have gone “upon the act of sailing without a *British* register.” On both these points, therefore, I am of opinion, that the claimant is entitled to the restitution of his property. On the first there was *no illegal act*; on the second there was neither *intention* nor *act*. On the first ground the Court would have expected the party to have exone-

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(a) Since the decision of this cause, an objection has been taken to the legality of a trade like the present, on the part of *British* Merchants fitting out from *British* ports slave adventures in foreign bottoms to the colonies of foreign nations, as being in breach of the regulations prescribed for *British* trade. This objection has been raised principally on the regulations of the 39 G. 3. ch. 80. —In the *Ramsdyche*, before the Lords, *March* 1806, still reserved for judgment, this argument was pressed. The regulations of the 39 G. 3. c. 80. which forbid *British* slave ships to be fitted out from other ports except *London*, *Bristol*, and *Liverpool*, were subsequent to the discussion of this case; and therefore the argument in its present form did not present itself. But since the trade to the coast of *Africa* was thrown open to all *British* subjects, 5 G. 3. ch. 44. § 4. several acts of Parliament have passed for the regulation of collateral points, as respecting *numbers*, and *the forms to be observed, on landing in British islands, &c. &c.* 28 G. 3. ch. 54. 29 G. 3. ch. 66. 31 G. 3. ch. 54. 35 G. 3. ch. 90. 37 G. 3. ch. 118. In all these acts, the terms of the provisions seem to relate only to the regulation of a trade *exclusively British*, viz. To ships cleared out as *British* slave ships, and destined to *British* islands.—The same modes of expression are preserved in the late act, 39 G. 3. ch. 80. If the argument, as it now stands, is sustainable, it may be a question whether it might not also have been applicable to the operation of former acts.

rated

The
Asses.

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rated himself from the intention of trading with the enemy, after the knowledge of hostilities, if the colony had remained hostile. As the colony was not hostile at the time of the supposed importation, I think that is not necessary in this case, and I shall decree the property to be restored, on payment of the captor's expences.

Sept. 4th,
1804.

Blockade of
Havre—Excuse
over-ruled—
Condemnation.

THE ADONIS, GOTTSCHALK.

THIS was a case respecting a vessel captured on the evening of the 13th *July*, standing towards *Havre*, east south east of *Cape Barfleur*, after having been warned by one of the blockading frigates that *Havre* was under blockade. The excuse offered on the part of the master was, that the mate had asserted the land to be *English* land; that the master was doubtful as to that fact, and for the purpose of ascertaining it, had continued his course towards the land,

JUDGMENT.

Sir William Scott.—In deciding questions of this kind, the Court cannot but be sensible of its own insufficiency, on many occasions, to estimate the full effect of the various incidents of navigation, on which the exact truth and justice of the case may frequently depend. Yet there may be facts so simple, and decided in their nature, as to remove all doubt, and to impress conviction almost with perfect certainty. In the present case, the destination is represented to have been to *Nantes*; the ship was taken very near *Havre*, which is obviously not a natural course to be pursued for *Nantes*; and therefore the master is necessarily laid under the obligation of explaining his conduct, and of accounting for the situation in which the ship

The
Adonis.September 4th,
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was found. An excuse is offered; and the Court has to determine, whether the representation now given can be received as credible. The excuse is, "That on the day before they were taken, they had been sailing down the *Channel*, and had seen the *English* coast; that on the next day they saw a projecting land, which the mate took for the *Start* point, whilst the master asserted it to be the *French* coast, and stood in to determine this fact." I will not take upon myself to say that such a mistake might not be possible. It might happen, that nothing was visible but a projecting headland, and that the country behind was not so apparent as to shew whether it was *French* or *English* land. I should be unwilling therefore to lay much stress on that mistake, though it certainly does not appear to my apprehension to be a very probable one. But there is one fact on which I think reliance may more safely be placed, and that is, that after the ship had spoken with an *English* frigate in the morning, and had had an opportunity of receiving information, the same course was still continued. The master says, "that he could not clearly understand from the *English* officer what land it was." If a doubt existed in his mind, it is quite impossible that he should not have made more particular inquiry, in order to ascertain, for the interest of his employer, whether he was in a proper course for *Nantes*; or, whether he might not be near some other *French* ports, which he must know to be interdicted. This would have been the natural conduct, if a doubt had really been entertained; and it could scarcely be questioned, that the *English* frigate was fully competent to give the necessary information. No application of this kind was made; but

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Argonius.

September 4th,
1804.

after the vessel had been brought to, and warned in the morning, as soon as the *English* cutter was out of sight, she was again put round to the *French* coast, and was found in the evening by another *English* cutter steering a course directly into the bay of *Havre*; and when the master was asked "how he came there," the only answer is, "that he wanted to be better acquainted with the *French* coast." Is that a sufficient reason?—or is not the conduct of this vessel so entirely at variance with all probability, and with all notions of common prudence, as to make it almost impossible, that the vessel could be brought into such a situation, but for some sinister purpose. Even here again, I will not say that it is absolutely impossible, that the master may have acted in this very weak and foolish manner, merely through extreme indiscretion. But if the owner trusts his property to the care of such a person, he must be held answerable in some degree, for his prudence, as well as for his integrity. If the master has acted in such a manner, as cannot for the safety of other cases be admitted to proceed from justifiable ignorance, his principal must take the consequences of his imprudence. The excuse set up is incredible in itself, and is practically inconsistent with the maintenance of the blockade, and I reject the claim.

On the cargo, which was reclaimed for other persons than the owner of the ship, the King's Advocate contended—That the presumption from the conduct of the ship applied also to the cargo, since it was not to be supposed that the master could have had any view in the fraudulent deviation of which he now stood convicted, but for the service of the owner of the cargo.

On

The
ADONIS.

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1804.

On the other side, Laurence and Robinson, contended That the presumption, however strong, was only a presumption of evidence which might be counteracted by other proof. That the master was not *de jure* the agent for the owner of the cargo; and therefore that the Court could not find the same satisfaction in concluding the claim of the proprietor on the principle of legal responsibility, on which considerable stress had been laid in the sentence of the ship. That, allowing the supposition of a fraudulent collusion on the part of the owner of one part of a cargo, there might yet be other owners of other parts, who were not acquainted with the fraud, and who relied only on the general representation of the voyage, and could not therefore be fairly precluded by the actions of other individuals, as creating conclusive presumption against them. From this consideration, it would appear how unfit the presumption arising from the conduct of the vessel alone was, to be pressed beyond its just rate as matter of evidence, or to work a peremptory conclusion in such cases.—Judgment reserved.

On the next day, Sept 5th.

Sir William Scott.—This is a case in which I have taken some short time to deliberate, being unwilling to press with any degree of unnecessary severity, the effect of presumption against this class of cases more especially, because it is one in which the principle of law, though unquestionably built upon the just rights of war, must be allowed to operate with some hardship upon neutral commerce; and because it is a class of cases, on which the Court has little authority to resort to, but has to collect the law of nations from such sources, as reason, supported in some slight de-

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 ARONIS.
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gree by the practice of nations, may appear to point out. In the present case, it is now to be assumed, that the ship was taken in a course to *Havre*. I collect that from the strange and incredible account of the master, which, I have already said, in my opinion, cannot be true. It is to be inferred also, I think, that the master was induced to make this deviation from some sinister intention; and I may be warranted to presume, that all this would not have been resorted to, but in the service of the cargo. It has happened in other blockade cases, that excuses have been set up from want of water and provisions, or from other occasions; but when the Court pronounces these excuses to be not real, a presumption *necessarily* arises that it was for the delivery of the cargo, that such a fraud had been attempted; since there is scarcely any other adequate motive which can be supposed to induce a master to hazard the interests of his vessel; the motives which he has assigned being demonstrated to be false. There is a presumption also in such cases, that this is done with the knowledge, and at the instigation, of the owner of the cargo; because although it is not an impossible thing that masters may be guilty of barratry, it is not a natural conduct, nor what is gratuitously to be supposed. These are, I think, just inferences; and the only question can be as to the effect of the presumption arising from them, whether it shall exclude all contrary averment, or whether it shall operate only as matter of evidence, in concurrence with other proof, as to the guilt of the intention. It must undoubtedly *bind* the owner; but the question is, whether it shall do so *presumptively*, or *conclusively*; and whether the party shall be let in to prove a contrary intention. I am of opinion that he cannot. I
 will

will not say that the fact may not exist, that a master should commit a barratry in a case of this kind ; but I think myself justified in holding that the owner cannot be admitted to go into proof on this point, on account of the fraudulent abuse to which such a liberty must inevitably lead, since it would be perfectly easy at any time to set up the pretence, and equally impossible on the other side to detect it. For what would be the ordinary test ? Letters sent to correspondents elsewhere, and insurances—measures wholly in the power of the parties, and capable of being made, at their pleasure, a complete *recipe* for a safe traffic with a blockaded place. When this consequence is duly weighed on one side, and when it is considered on the other, what few inducements a master can have to go to any other port than that, at which his charter-party binds him to deliver his cargo, and particularly to a blockaded port, it appears to me, that less injustice will be done by adopting this rule, than by permitting the freighter to distinguish, by external and collateral evidence, the destination of his cargo from that of the master.

It has been argued that the master is not the representative of the owner of the cargo. Certainly he is not, to that extent, and in the same direct manner, in which he is held to be the representative of the owner of the ship. On that account, in some cases, where facts have shewn that the intention of the owner was pure, the Court has given the party the benefit of this distinction ; for instance, where the voyage began before the knowledge of the blockade, and where the master, on being warned, has appeared to have been actuated only by a personal obstinacy and perverseness, in pursuing his course to the place of his original destination. That is a case where the intention of the owner is

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ADONIS.
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admitted to be pure, where nothing stands against it in *limine*, where there is no question of fact, whether he was consentient to the fraud; and where, if he was affected at all, it could only be by the strict legal principle, that affects the principal by the conduct of his agent. Here the blockade was perfectly well known to all parties at the time of shipment, and therefore the question is raised, whether the owner was not consentient at first, and whether the conduct of the master is not demonstrative evidence that he was so. In my opinion the effect of all just presumption is against him; since there could scarcely be any inducement to lead the master to commit such a fraud, contrary to the instructions and intention of the owner of the cargo. Considering the infinite danger of admitting the shippers to distinguish their purpose from that of the master, I feel myself obliged to hold, that it is sufficiently proved that the ship was going to a blockaded port, for the purpose of delivering the cargo, and with the knowledge of the proprietor; and that the cargo is legally involved in the same penalty as the ship.

SHEPHERDESS, MILLER.

September 4th,
1804.

Blockade of
Havre—Effect
of a contingent
destination as to
American vessels,
defeated by the
obstinacy and
wilful perse-
verance of the
master, after
warning.

THIS was an *American* ship and cargo, taken on a voyage from *America* to the port of *Havre*, in violation of the blockade of *Havre*.

JUDGMENT.

Sir William Scott.—This case sets off with some circumstances in the conduct of the claimant, which are not

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SHEPHERD;
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not entitled to the praise of a fair and ingenuous proceeding. It begins with this fact, that though the ship was intended to go to *Havre*, all the ostensible papers bear a destination for *Embsen*, to which port the vessel was not to go in any event, unless all the ports of the *Channel* should be in a state of blockade. It is impossible to maintain, that it is a just representation of such a voyage, "to describe it to *Embsen and a market*;" when *Embsen* was the very last port to which the vessel was to resort. Yet all the public papers are made out for *Embsen*, and it is only in private letters that a destination to *Havre* is avowed; with regard to which, it is to be observed, that it depended very much on the discretion and good faith of the master, whether the letters would be produced or not. In some cases it has appeared, that the masters of *American* vessels have very improperly conceived themselves to be under no obligation to produce such papers, which they consider as *private papers*; and as not belonging to the ship. In all events it must have depended very much on the good faith of the master, whether he would have produced these concealed papers or not, and there are, I think, circumstances that shew it not to have been the disposition of the master to produce them in the present case.

It must be inferred, and indeed admitted, that the notification of the blockade of *Havre* had been received in *America*. To all the general rules of observance of a blockade duly imposed, the subjects of *America* are undoubtedly bound equally with those of other countries. At the same time looking to the great distance at which they are placed, and being unwilling to press, with any degree of hardship on the fair convenience of commerce, the Court has held,

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Swynherdiss.
 September, 4th,
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even where the blockade of a port in *Europe* has been notified in *America*, that the merchants of that Country might still clear out conditionally for the blockaded port, on the supposition that before the arrival of the vessel, a relaxation might have taken place. But as to the line of caution to be observed in this state of uncertainty, the Court has always expected that the inquiry should be made at some of the *British* ports in the *Channel*. It could not be, that ships should be permitted to resort to the ports of the blockaded Country for this information, since every one must perceive that such a liberty would place it in the power of the enemy to determine the continuance of the blockade. The ports of the *blockading Country* are certainly the proper ports for inquiry; and it would not be too much to expect, that this precaution should be noted in the papers, and that it should be most explicitly enjoined on the master and supercargo in their instructions, to obtain the information, that might be necessary to fix the destination, at some of the *British* ports in the *Channel*. I must observe also, that there is less room for excuse in this instance, since it is stated to have been the universal impression in *America*, at the time of sailing, that *Havre* was under blockade. There could have been scarcely a doubt as to any relaxation of the blockade; and therefore it became incumbent on the parties to send out their vessel with more particular caution.

The ship sailed, and appears, evidently, to have pursued a voyage for *Havre*, not only by her course, but also by a letter put on board, at sea, by a *French* privateer, directed for *Havre de Grace*, a few days before the capture. She was coming up the *Channel* towards *Havre*, with no other port apparently

parently in contemplation. Another fact which bears a strange and unfavourable appearance against the master, is the representation which he has given of what passed between him and one of his Majesty's ships, "that on being hailed by a King's ship, he answered that he was cleared for *Embsden*, but was going to *Havre*, if not under blockade, and that he was permitted to proceed." Could this have been the whole of that conversation, or can this be a fair account of it? The King's ship, on being informed of an intention of going to *Havre*, would have immediately endorsed the usual prohibition on the papers. It is morally impossible that the conversation could have stopped short in this manner, or that the master should not have been warned against proceeding to *Havre*, and with very imperative effect. The other witnesses, who are the mate and the supercargo, make no mention of *Havre* in their representation of this conversation. According to them, the answer was, "that they were bound to *Embsden*." If their account is to be believed, it will very considerably affect the master as to his veracity, and will also fix upon him a material violation of his duty, in not stating the whole truth of his destination. But does it not go farther, and involve these other witnesses also, as parties to the fraud, if they heard this representation, and did not correct it? more especially, since one of them is the *supercargo*, the agent entrusted with the *management of the cargo*, and capable of affecting his employers with a legal responsibility for his acts. These witnesses are, I think, to be taken as privy to the fraud on the *British* cruiser; and as concurring in suppressing the true destination of

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Sloop-of-war
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SWEETNESS.

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of the voyage. Then how can the Court give credit to the subsequent part of their representation, viz. that "they were afterwards met by another *British* cruizer, the *Pluto*, and were told "that they must not go to *Havre*, but that they might go to *Fecamp*; that the master nevertheless kept the ship's course to *Havre*, but that he was in a continued state of intoxication, and that it was the intention of the supercargo not to have permitted him to go into that port."

The master himself says, that he was intoxicated; but if such an excuse could be admitted, there would be eternal carousings in every instance of violation of blockade. The master cannot, on any principle of law, be permitted to stultify himself in this manner by the pretended or even real use of strong liquors, of which, if it were a thing to be examined, the Court could in no instance ascertain the truth of the fact. The owners of the vessel have appointed him their agent, and they must in law be bound by his imprudence, as well as by his fraud. As to the cargo, the supercargo says, "that he would not have suffered the master to go into *Havre*," but he had taken no steps to supersede him. It would be a dangerous doctrine to hold, that a master in a state of intoxication might be permitted to go on for the blockaded port, and that the supercargo should lie by, and then come and plead the intoxication of the master, and exculpate himself, by stating a mere intention to dispossess him, and to steer another course. It was the duty of the supercargo, and of the officers concerned in the navigation of the ship, to have dispossessed the master of the command in such critical circumstances. Here was a vessel duly warned not to

go into *Havre*, yet the master in a continued state of intoxication refuses to alter his course. I cannot think that it would have amounted to any culpable act of disobedience, or to any thing like mutiny, to have resisted the command of such a master, in such a condition, and to have given a proper direction to the voyage. Instead of that, the supercargo suffers the vessel to proceed in this interdicted course, and relies only on a secret intention of his own mind, to dispossess the master before he actually got into *Havre*, without being able to shew any one step taken for that purpose. Looking at the whole case throughout, and recollecting always the fraudulent suppression of the original voyage, I am of opinion that, if the instructions had been much more clear, on the part of the owners, than these are, they could not have been allowed to weigh against the actual conduct of the master. It would be the easiest thing in the world to put on board instructions perfectly smooth and unobjectionable; if *they* alone could be sufficient to exonerate the owner from the penalty attending the misconduct of the vessel, by imputing it to the mere barratry of the master, there would be an end to all means of enforcing a blockade. I am of opinion that the owners of the ship must be concluded by the conduct of the master; and I think that the Interests of the cargo are also implicated in this act, and that the ship and cargo are subject to condemnation.

The
SHEPHERD.

September 4th,
1804.

Sept. 6th
1804.

LA FLORE, FILS.

Joint Capture—
Presumption in
favour of a
King's Ship from
being in fight
alone, sufficient
to support the
animus capiendi.

THIS was a case of joint capture, on evidence chiefly, but involving a question of law respecting the claim of a King's ship, to share in a capture, made by the Trimmer privateer, on the ground of *being in fight*, only, without an affirmative averment of the fact of joint chasing.

JUDGMENT.

Sir William Scott.—This case has been not improperly described to be a question of credit ; a character which can by no means be said to be peculiar to the present case, since it belongs almost universally to the whole class. No class of cases is better supplied with witnesses on both sides, each set generally speaking up to the full exigencies of their case. We find them seeing not unfrequently over capes and headlands, and sometimes over whole islands, and speaking nevertheless to facts so seen by them, with as much precision, as if they were matters of the purest and most absolute demonstration. The Court has generally to perform the unpleasant task of discussing the credibility of such witnesses, and of deciding on which of the two accounts it can most safely rely. A question of law, however, has been introduced into the argument, on which it may not be improper for me, in the first place, to say a few words. It is observed that the claimants, in joint capture, have only pleaded the *being in fight*, without asserting that they were in *chase* ; and it is contended, *that it is necessary to plead and prove that they were joint chasers, as well as that they were in fight*. The manner in which
the

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LA FLORE.

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the facts are alleged, would, I think, scarcely support this objection, because *it is* stated in the plea, that they *were in chase* under the disadvantage of an almost entire calm, and a part of the evidence goes to support that fact. But I conceive that the law is not correctly laid down in this representation, as applying to the case of King's ships. *They* are under a constant obligation to attack the enemy wherever seen; a neglect of duty is not to be presumed, and therefore, from the mere circumstance of being in sight, a presumption is sufficiently raised, that *they* are there *animo capiendi*. In the case of privateers, the same obligation does not exist. The law, therefore, does not give them the benefit of the same presumption. Ships of this description go out very much on speculations of private advantage, which, combined with other considerations of public policy, are undoubtedly very allowable; but which do not lead to the same inference, as that which the law constructs on the known duty imposed on King's ships. A privateer is under no obligation to attack all she meets, but acts altogether on views of private advantage. She may not be disposed to engage in every contest; and, therefore, the presumption does not arise, in any instance, that she is *present, animo capiendi*. A *contrary route*, if proved, would defeat the claim even of a King's ship. But if nothing appears, on one side or the other, as to that fact, the mere presence would, I think, be sufficient to entitle the King's ship to the character of a constructive joint captor. Having disposed of the question of law, I come now to compare the credit of the witnesses. The witnesses whom the Court is always disposed to hear in the first instance, and to whom it gives the greatest degree of credit, are those
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of the captured crew. So much is the Court in the habit of looking to their testimony, as the foundation of its decision, that I believe there is no instance, in which a claim of joint capture has been established; on the evidence of the asserted joint-captor alone, and for the reason to which I have alluded, that there is scarcely any case, that might not be so proved; since it is a matter of common observation, in causes of this description, that many persons, who are in general respects persons of apparently good moral conduct, will, from considerations of private interest, or from feelings of good fellowship, or from sinular ideas of honour, not scruple to support at any lengths the cause of those with whom they have been associated. The testimony of the *captured*, it is true, may sometimes be liable to the imputation of being induced from vanity to represent the surrender as made *to a King's ship*, in preference to a privateer, in order to save their credit, and under an expectation perhaps that they shall receive rather more indulgent treatment. There may therefore be some little bias on this side also, against which the Court will be on its guard; though in the present case there is but little room for this vanity, since it cannot be denied that the privateer was alone sufficient to effect the capture; there was therefore no glory lost, no vanity to be saved. Making all due allowances, however, on this side, the Court will still find reason to consider them as the least *objectionable* witnesses that can in such cases be produced. It will be unnecessary to travel through all the objections, that have been taken to the imputed contradictions in the evidence in support of the claim. It will be sufficient to say, that I think they are satisfactorily cleared away

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by the observations that have been made on the other side. The depositions of the three witnesses examined in preparatory all represent the *Huffar* to have been in fight. In ordinary cases, the Court looks with great attention to their evidence. It is taken almost immediately after the capture, and before the passions of the witnesses can have been embarked in the dispute. These all support the claim of the King's ship; but in this instance their testimony has been exposed to some degree of deduction, from the conduct of the King's ship, in dispossessing the actual captor, and taking the prisoners into their custody, a practice highly improper, and never to be mentioned in this court without an expression of dissatisfaction. To have put some person on board to take care of their interest, would have been perfectly correct; but to dispossess the actual captor, who is in some measure become the agent for the claimant, is on many grounds irregular; and it does, in this instance, expose the king's ship to no inconsiderable disadvantage, from the objection, that the witnesses who speak most effectually in their favour, have been produced out of their own hands, and speak therefore perhaps under some degree of undue influence. Amongst the ill consequences of such a proceeding, may be reckoned, the irritation with which this dispute has been carried on to a plea, in which many things are introduced, to which I shall not think it necessary to advert. The main question is, whether the *Huffar* was in fight? The three witnesses who have been examined in preparatory, corroborated by the testimony of a fourth, the boatswain of the vessel, all depose, "that she was," and with something of circumstance detailed in their evidence, which

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which shews, that their attention was particularly called to the fact. These witnesses were persons in an official capacity on board the ship, and I cannot but assent to the remark, that they are, for that reason, entitled to rather more credit; since the nature of their employment, and the responsibility of their situation, would naturally excite greater attention. It would also afford more opportunity and leisure, and call upon them to be more particular in the observations which they made, that they might be enabled to give a satisfactory account of their conduct to their employers; whilst the attention of others, in an inferior station, would be more taken up in the service of the vessel, and in observing the ship which was more immediately close to them. In support of the claim of the king's ship, there are the captain, the second captain, the lieutenant, and the boatswain, of the captured vessel, who are, I think, entitled to some advantage in point of credit, on the grounds which I have stated. There is also a species of evidence to which the court is in the habit of paying great attention, the documentary evidence of the log-book of the prize, which mentions "*the fight of a ship early in the morning, which appeared to be a frigate.*" An objection has been taken to the order in which this entry appears to have been made; but I have examined the book, and do not find that there is any thing to weaken the effect of the inference which is derived from it. There are then four witnesses, and this record. What is the evidence on the other side? The testimony of witnesses rather more in number certainly, from on board the prize; but they are common mariners, liable to the remarks above stated,

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that their credit is on that account somewhat diminished, beyond what could be attributed solely to mere inferiority of condition. They are besides negative witnesses, respecting whose testimony, in opposition to affirmative evidence, it is become a known rule of law not now to be discussed, that they are, *ceteris paribus*, to be heard with less attention. Even *they* admit, that they had seen the *Huffar*, and at the time corresponding with the entry in the log-book, and although *they* did not see her afterwards, she might possibly be visible to other persons on board. There are besides five releasing witnesses from the privateer, who state two facts, one, on which they agree with the last witnesses, in saying, "*that there was no ship in sight*;" and a second, on which they disagree with the whole evidence in the cause, viz. as to the time of capture, "*that it was made at half past twelve*;" whilst all the other evidence *clearly shews* it to have been about three o'clock in the afternoon. This, I say, is *most clearly shewn* from the concurrent testimony of the *French* witnesses, and the log-book of the captured ship; and if I cannot lay my hand on that fact as a demonstrated fact, there is no fact in the whole case on which any reliance can be placed. The allegation given on the part of the privateer, nevertheless, states the capture to have been made *at half past twelve*. This assertion is laboured, not only in the allegation, but also in the testimony of the releasing witnesses, and in the privateer's log-book. When I find this representation contradicted by all the *French* witnesses, even by those produced on the part of the privateer, I cannot but consider it to be a gross mistake; and one which throws no slight degree of colour over the whole case; since I cannot believe

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that it was so immaterial a fact, at least in the conception of the parties themselves, as their counsel would now represent it. On the interpolation which is charged to have been made in the log-book of the privateer, I shall forbear to observe farther than to say, that there are appearances, which might induce a suspicion that some alteration had taken place. At any rate, when I see such gross inaccuracy, opposed to the combined testimony of all the witnesses from the captured ship, which is not to be set aside on the mere evidence of releasing witnesses, I think I am bound to pronounce for the claim of the *Huffar*. The only remaining question relates to costs, which I should certainly have given, if it had not been for the conduct of the king's ship, in dispossessing the actual captor of the prize. This is on many grounds, as I have already had occasion to observe, a reprehensible practice, and may have led to a great deal of the irritation with which this cause has been contested. It may, indeed, have been the sole cause of this litigation, because, if the *French* witnesses had told their story when produced by the actual captors themselves, there could scarcely have been a foundation for the resistance, that has been given to the claim of the *Huffar*. I am of opinion, that the king's ship has in this conduct receded from the right of costs, which otherwise would certainly have been given.

On reconsideration, the Court directed the expenses on both sides to be deducted out of the proceeds.

THE 'CHARLOTTE, FOCKS.

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THIS was a question respecting a quantity of copper in sheets, taken on a voyage from *Stockholm* to *Amsterdam*, and claimed as the property of merchants in *Sweden*.

Swedish treaty—
copper in sheets,
if contraband.

On the part of the Captor, the King's Advocate contended—That this copper was to be deemed contraband, more particularly under the terms of the *Swedish* treaty (a), by which the supply of all manufactured articles, immediately serving for the equipment of ships of war, was prohibited. By the certificate of inspection which was now returned, it would appear “that one part of the copper in question was fit for the sheathing of shipping—although the same return stated, that another portion was doubtful, as to its fitness for that use, and that the remaining part was not fit for that purpose.” The quality of these latter parcels, however, will not be material, since if any part is of the description of contraband, it will affect the whole shipment, being the property of the same person.

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Art. I.

On the part of the Claimant, Laurence and Swabey contended—That this was a question of considerable importance to the trade of *Sweden*, although the present quantity in dispute was very small, not more than three tons. That it could not be supposed that the stipulation in the *Swedish* treaty was meant on either side to prohibit the exportation of articles of *Swedish* produce, farther than the interests of the belligerent Country were likely to be affected by them; that it could not therefore be intended to comprehend any other copper than such as was fit for the purposes of

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war. That the certificate of the officers of the Dock-yards did not state any part of this copper to be peculiarly adapted to naval purposes, but "that the whole was fit for all the ordinary purposes to which copper is usually applied." That as to that portion which was reported by them to be fit for sheathing of ships, their opinion was not conclusive; it would be proper to set in opposition to it a certificate which was now introduced from the managers of the *Swedish* Copper Company, stating, that this copper was peculiarly assorted for the use of copper-smiths; that copper for sheathing of ships was never ordered from them but of two (*specified*) dimensions; and that this copper was not fit for that purpose.

In Reply, the King's Advocate contended—That the only question would be, whether this was *sheet copper* (a), or copper in a manufactured state, serving for the equipment of ships of war. It by no means appeared that the sheathing of vessels was the only naval purpose for which the exportation of copper was intended to be prohibited, since it was an article used in various other branches of naval equipments. But if any part was liable to be considered as contraband it would affect the whole quantity. The opinion of the *Swedish* Copper Company was not *produceable*, as being not on oath; it was besides very apparent how little credit was due to it, since it averred that no part of the copper was fit for the sheathing of vessels, although the contrary was now certified by the official persons of his Majesty's dock yard, to whom that question had been referred.

(a) In the treaty with *America*, 1795, Art. 18. *copper in sheet* is specifically enumerated amongst articles of contraband, "*serving directly to the equipment of vessels.*"

JUDGMENT,

Sir *William Scott*.—If it is contended on the part of the Crown, that copper in *sheets*, though not adapted to the sheathing of ships, is contraband under the treaty, it is a question that may be of considerable importance, and one that I shall certainly direct to stand over for further consideration. The decree which I am disposed to make at present is, to condemn that part which is reported fit for the sheathing of vessels; farther than that I shall not go. In ordinary cases, the rule is, that one article of contraband quality will affect all the parts of the cargo on board belonging to the same proprietor; but this is a new case, respecting the construction of a treaty, on which a difference of opinion may have been entertained. I shall therefore not apply the old rule to this case, but direct the undisputed articles to be restored. The other parcels of copper which are reported to be of a doubtful quality, must be reserved for farther consideration.

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THE PRESIDENT, WELLES.

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THIS was a case of a ship taken on a voyage from the *Cape of Good Hope* to *Europe*; and claimed for Mr. *J. Elmslie*, as a subject of *America*. It appeared that he had been a *British* born subject, who had gone to the *Cape of Good Hope* during the last war, and had been employed as *American* Consul at that place.

National character—Claim for an asserted *American*, settled at the *Cape of Good Hope*, rejected—Plea of removal not sufficiently substantiated.

In support of the claim, *Laurence and Robinson* contended—That the claimant was entitled to the most favourable construction of his case that was consistent with the rules of law. That he was a *British* born subject, who had settled at the *Cape*; and though he

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had borne the character of an *American* Consul, whilst that settlement was under *British* possession, it appeared that the *Dutch Government* had since refused to admit him in that character, from which it might be inferred that he was considered at the *Cape* rather in his hostile *British* character, than as an incorporated *Dutchman*. That his vessel had been, during the year preceding the present voyage, hired by the *East India Company* to carry troops to *India*; that she had been in that employment recognized as an *American* vessel, and was now coming in that character, in the service of *British* merchants, under a licence from the *British Government*. That the claimant was, besides, entitled to be considered as a person settled there, *during British possession*; and as affording evidence of an intention to remove, since there was a letter on board, written to his correspondent at *Emden*, in which he directs him "to sell the ship, and remit the proceeds to him in *America*, where he hoped to be in a few months." It was prayed on this point that proof might be permitted to be given of his removal.

On the other side, the *King's Advocate* contended—That he could be no otherwise considered by the Court, than as a resident merchant of a *Dutch* settlement. This ship sailed so late as *March* 1804, nearly twelve months after the breaking out of the war, and left the owner still resident there in his *Dutch* character. That there was no case in which an intention to remove, after a residence so long continued, for nearly a whole year after the breaking out of the war, had been allowed to be averred, and no overt act of removal was asserted to have taken place.

JUDGMENT.

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Sir William Scott.—The Court must, I think, surrender every principle on which it has acted, in considering the question of national character, if it was to restore this vessel. The claimant is described to have been for many years settled at the *Cape*, with an established house of trade, and as a merchant of that place, and must be taken as a subject of the enemy's country. The ship was purchased by him of an *American* owner; and still continued to be documented as an *American* vessel. It has appeared, I think, in other cases, to be the disposition of the *American* Government to confer the privileges of *American* navigation on vessels occupied by their Consuls in foreign states. That Government has, undoubtedly, a perfect right to grant such a privilege for the purposes of their own navigation; at the same time, that this country is also at liberty to apply, what we consider as the more correct principle of the law of nations, so far as third parties are concerned. Some stress has been laid on the services in which this vessel had been employed, and in which she *was* engaged at the time of capture, under a licence, which is said to amount to a recognition of her *American* character. Any description that is given of her in that licence, must depend entirely on the representation of the parties, and if *that* is not true, it will not avail to affect the principle of law, that would be otherwise applicable to the vessel in her proper character. Such a recognition, as it is called, has never been allowed to weigh in any case of vessels coming under a licence, whenever a question has been raised as to the real character of the owner, or as to the fact of property.

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perty. This circumstance, therefore, is immaterial. It is next said, that the claimant is entitled to the benefit of an intention of removing to *Philadelphia* in a few months. A mere intention to remove has never been held sufficient, without some overt act; being merely an intention, residing secretly and undistinguishably in the breast of the party, and liable to be revoked every hour. The expressions of the letter, in which this intention is said to be found, are, I observe, very weak and general, of an intention merely *in futuro*. Were they even much stronger than they are, they would not be sufficient: Something more than mere verbal declaration, some solid fact, shewing that the party is in the act of withdrawing, has always been held necessary in such cases. Nothing of that sort is averred. The Court is therefore under the necessity of considering this gentleman as a merchant of the enemy's country, and of pronouncing the ship, as his property, liable to condemnation.

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THE CHARLOTTE, WITT.

Prize interest, in virtue of a seizure made by a private ship of war, asserted to be attached as tender to a King's ship—
The fact of her being so attached not made out.
Condemnation, as droits, the master of the privateer not being on board.

THIS was a case of interest, asserted on the part of his Majesty's ship the *Euridice*, in a capture made by the hired armed revenue cutter the *Duke of York*, on a suggestion that the cutter was placed under the command of the *Euridice*, and was to be considered as a tender attached to that vessel.

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On the part of the Admiralty.—It was submitted, that the Cutter was put under the command of the *Euridice*, as a superior vessel on the same station, but that she was not attached as a *tender*. That the capture was made whilst the master was not on board, and therefore, that the Prize must be condemned as a droit of Admiralty.

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JUDGMENT.

Sir William Scott.—The question which arises on the capture of this vessel is, viz. Whether the actual captor can be considered as *commissioned*, and as *commissioned in such a manner* as to entitle the King's ship to take an interest in the prize. The capturing vessel was a revenue cutter, and, according to the practice of the present and last war, commissioned with a letter of marque. The policy of employing such vessels in this manner is, I believe, a modern usage, arising out of the exigency of the public service, which has particularly required the use of small vessels of this kind. They have been allowed to take out private commissions, and if those commissions are properly executed, they will enure to the benefit of the parties till they are superseded; and I am not disposed to think, that the employment of the vessel in the manner alleged would have the effect of superseding that commission. It happened that the master was not on board at the time of capture; and on that account no claim is made for the vessel herself, but for the *Euridice*, as the vessel to which she is represented to have been attached as a *tender*. It is said that she was commanded by a lieutenant of the *Euridice*; but by what reasoning that can be made out I am at a loss to conceive, since it appears that

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that every order was addressed to the master, and there is no circumstance appearing that leads to a supposition, that there was any such person as the lieutenant of the *Euridice*, on board. The claim for the King's ship is given, in virtue of a seizure said to be made by this vessel, *as a tender*; and in order to support that averment it must be shewn, either that there has been some express designation of her in that character by the orders of the Admiralty, or that there has been a constant employment and occupation, in a manner peculiar to tenders, equivalent to an express designation, and sufficient to impress that character upon her. The former species of proof would undoubtedly be most desirable, but no such description by the Admiralty is averred. She is not described any where as a tender, *in terminis*. Then what is there in the mode of employment? I see nothing in the orders to distinguish her from any other small vessel that might be associated with a King's ship to act under superior command, but not as a tender. I am of opinion, therefore, that there is no sufficient foundation to induce the Court to consider her in the capacity of a tender (*a*). She is not so recognized in

(*a*) Since the decision of the Court of Admiralty, in the case of the *Melemane, Colas*, supra, page 41, against the competency of King's ships, on *some stations to constitute or adopt tenders* manned from their crew, to be a part of their force, authorised under the original commission of the ship, to take prizes for the benefit of the King's ship.—A similar question has been discussed before the Lords of Appeal, *as to the effect of such a practice in the West Indies*, on the claim of the *Abergavenny* to share in the capture of *Curacao*, in virtue of the presence and co-operation of a tender *so constituted*, and sent out to cruise by the captain of that ship, without the intervention of any public authority. When the Court of Appeal decided against the claim.—The island of *Curacao* and its dependencies, Lords, May 4, 1805.

terms

terms by any authority proceeding from the Admiralty; neither is the nature of the service imposed upon her such, as to induce a supposition that she must have been so considered by the Admiralty. As the master was not on board, the legal interest in the capture will not enure to the private captors under their commission; but it must be condemned as a droit of Admiralty, taken by non-commissioned captors.

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THE LIESBET VAN DEN TOLL, HEEST.

THIS was a question respecting the national character of a fishing-adventure, carried on by a native Dutchman, who had become by *domicil* a subject of Prussia, and had purchased the vessel, formerly a Dutch vessel, in February, at Embden. It appeared that he had since been employed in fishing off the Dutch coast, having sold his cargoes to English ships, and having once or twice resorted to Dutch ports, not for the purpose of selling his cargoes, but merely to procure bait.

National character from occupation in the fishing trade of Holland—Restitution.

JUDGMENT.

Sir William Scott.—It appears to me that this case is very favourably distinguished from that (a) of yesterday, where there was reason to believe, from the evidence of the mate, that the master had delivered his cargoes in Dutch ports; although that circumstance was altogether suppressed by the master in his deposition. That fact, connected with the original character of the vessel, and of the master, seemed to the Court to amount to a case of Dutch occupation, and the vessel

(a) *Jonge Jeroen, Krom*, condemned 9th October 1804.

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was on that ground condemned. Here the occupation is certainly much slighter. It is not denied, that a native *Prussian* might have engaged in such an adventure, without drawing on himself the consequences of a *Dutch* character. He might unquestionably have resorted to the *Dutch* coast for the purpose of fishing; as it is indeed not unusual for fishermen to frequent very distant shores. Then the only question will be, whether this man, being a native *Dutchman*, and a *Prussian* subject by domicile only, but of seven years continuance, and not having recently taken it up for any purposes connected with the present war, would be differently affected by this employment. I am disposed to hold that he would not. It was open to him to go to the coasts of *Holland* to carry on his fishery in his *Prussian* character; he was also at liberty to sell his cargoes at sea, as he appears to have done, in every instance, to *British* vessels, who have lately been very numerous on the coasts of *Holland*, and might be expected to furnish a good market for commodities of that kind. The only circumstance that can raise a doubt is, that he appears to have resorted to the *Tenel* for bait. It is said that this, though in itself a slight circumstance, affords no immaterial indication of the *Dutch* character, and of the *Dutch* origin of this employment. But I am not prepared to say that this circumstance alone, unconnected with any habits of delivering his cargoes in the *Dutch* ports, will be sufficient to affect him with a *Dutch* character. To hold otherwise would, I think, be to press the doctrine of occupation rather too rigidly, against a class of cases which has usually been very favourably considered, and treated with peculiar lenity and forbearance.

Restitution.

THE COMET, ADAMS.

October 10th,
1804.

THIS was a case of a *British* vessel, that had been captured by the *French*, and sold in a *Spanish* port, after a condemnation had passed in the Courts of *France*.

Condemnation in the Court of the enemy on a ship lying in a neutral port—*Henric and Maria, supra*—Prohibition on the part of the neutral country as to this practice—How far affecting the principle—Fact of such prohibition not proved.
(a) *Supra*, vol. iv. p. 43.

On the part of the Captors, the King's Advocate contended—That the present case was distinguishable from the *Henric and Maria* (a), by this circumstance, that the Government of *Spain* had actually prohibited the sale of vessels so situated in *Spanish* ports. That all the reasoning which was drawn from the acquiescence and sanction of the neutral state, in former cases, would therefore fail, and that this must be considered as an illegal transfer.

On the part of the Claimant it was said, That the prohibition alluded to had not issued till after the sale of this vessel.

JUDGMENT.

Sir William Scott.—There is, I think, abundant evidence to show that the argument raised on a supposed contravention of the *Spanish* law is not founded on fact. The sale passed by public auction, which would scarcely have been going on after such a practice had been prohibited by proclamation. There is, besides, the certificate of the *British* Consul, stating the prohibition to have been subsequent to this sale. It will therefore not fall within the range of the principle on which the distinction has been raised. Stripped of
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this circumstance, the case comes exactly under the authority of the *Henric and Maria*, in which this Court pretty strongly intimated its opinion, as to the correct principle of law, at the same time that it found itself bound by the current of former practice to restore. That case has, I understand, been argued before the Lords of Appeal, and is now waiting for the Judgment of that Court. Till the opinion of the superior Court is expressed, I shall adhere to the same course of decision, and restore the vessel. Expences prayed, not given.

October 11th,
1804.

THE APOLLO, KARSADT.

Blockade of
Dieppe—Excuse
over-ruled—
Complaint
against the mode
of taking the
master's depositions—contra-
dicted, not sus-
tained.

THIS was a case of a ship proceeded against for a breach of the blockade of *Dieppe*, after having had due warning noted on her papers. In the depositions, the master and all the other witnesses appeared to have said, “*that the master on being warned, declared that he was bound to Dieppe, and could not go any where else, and that if he could obtain a fair wind, he should run into Dieppe;*” and his conduct was represented as conformable to this declaration, in hovering on the coast of *Dieppe*. An affidavit was now offered on the part of the master, complaining that his answer to the interrogatories had been incorrectly taken; and that he had never made such a declaration, or entertained an intention of going into *Dieppe*, after the warning.

On

On the part of the Captor, the King's Advocate objected to this affidavit being received, observing, that no notice had been taken of any such misunderstanding till the 6th of *October*, a few days before the hearing; and that it was not entitled to credit.

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JUDGMENT.

Sir William Scott.—The first question which I have to determine is, how far the depositions can be taken to contain a true representation of the facts. If they cannot, the Court undoubtedly will be under the necessity of resorting to some other source of information. An affidavit has been offered on the part of the master, complaining that he has been very greatly misrepresented in these depositions; but I am of opinion that this complaint comes in a manner which does not entitle it to be received by the Court. It is a very lenient mode of administering justice, that prevails in these Courts, to take the evidence, in the first instance, only from the *captured*, who are produced, in the presence of the agents of the parties, before the commissioners and actuary, whose duty it is to superintend the regularity of the proceeding, and to protect the witnesses from surprize, or misrepresentation. When the deposition is taken, each sheet is afterwards read over to the witness, and separately signed by him, and then becomes evidence common to both parties; it being very rarely permitted to the captor to produce any evidence. The principle, therefore, on which the evidence is conducted, is as favourable to the claimant as it can possibly be. If any of these precautions are omitted, it would be competent to the party to complain immediately, and if such a complaint was regularly made, it would become

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come a duty most pressing on the conscience of the Court, to institute the most accurate enquiry into the grounds of such complaint. In this case nothing of the kind has been done; but when the cause is opened, and the depositions are read, then something is produced in the form of an affidavit, which is to have the effect of overruling all the evidence that has been taken in the solemn manner already described. I think I am bound to reject this affidavit *in toto*, and I cannot but consider it as an unjust imputation (a) on those who have the functions of the Court, for the purpose of taking the evidence, delegated to them. Then I am to consider the case on the representation which the master and the other witnesses have given. It appears that the vessel sailed ignorant of the blockade which had been imposed on the port of Dieppe (b)

(b) By Notification
6th Aug.
1804.

(a) On a subsequent day, in answer to the intimation which had been directed by the Court to be conveyed to the Commissioners and Actuary, before whom the depositions were taken, of the charge made against their proceedings in the master's affidavit, it was mentioned by the King's Advocate that the interpreter, Mr. Moses Hart, had made an affidavit, stating "that he had been twenty years employed as German interpreter, under the commissioners of the Court at Portsmouth, and that he had possessed a competent knowledge of the German language, from being born a Jew in Amsterdam; where the German language is usually spoken amongst Jews, and from a subsequent residence of many years as a printer in Berlin. That the depositions were taken with great caution, and carefully read over, and interpreted to the witness. That the account of the declaration therein contained was accurately taken down from the words of the master." The King's Advocate stated also that there were affidavits from the captain and officers of the blockading frigate, representing the conduct of the ship to have been conformable to the declaration of the master, as represented in his depositions.

but

but she was duly warned, and the master does not say that he did not understand the warning. I accede to what has been observed on the part of the claimant, that such a warning might be allowed to be received, at first, with some hesitation, and that it would not be the disposition of the Court to take advantage of any hasty expressions used in the moment of surprise. If a foolish declaration *was* made, apparently idle and without a persevering obstinate intention of carrying it into execution, it would, I think, be a harsh exercise of the rights of war to press such a hasty declaration to the disadvantage of the master, and more especially to the forfeiture of the property of others entrusted in some measure to his discretion. But if such a declaration is made, and accompanied by such circumstances as impress on the mind of the Court a conviction, that the master was persisting in a serious determination of acting agreeably to it, the captor is not bound to wait till he proceeds to carry his design into execution; it is sufficient that he had made a deliberate declaration, accompanied with such facts as induce the Court to believe, that he really intended to carry it into effect. It is said that a master, in such a situation, would be under much distress and difficulty to determine *where he should go*. It may be so; but he could be under no doubt, as to his negative duty, as it may be called, *that he was not to go* into the blockaded port. It must be clear and obvious to him, that the neighbourhood of the blockaded port cannot be considered as the fit *locus deliberandi* for his future plans. If the Court was to admit that a master might lie to, and call a council of his own thoughts, or of those of his crew, in such a place, the rights of blockade could no longer exist to any purpose,

The
APOLLO.

October 11th,
1804.

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pose; he would stay, in all cases, until an opportunity offered of slipping into the interdicted port. It would be practically inconsistent with the exercise of this right of war to hold, that the blockading force is bound to stay by him, and wait for the result of his deliberation in this suspected place. On the contrary, his first duty is obvious, *fuge litus*; that neighbourhood is at all events to be avoided. He is bound on the first notice to take himself out of an equivocal situation, and if he obstinately refuses and neglects so to do, this Court will hold, till it is corrected by the judgment of the superior Court, that such a conduct will amount to a breach of the blockade, and subject the vessel to condemnation. Then what is the fact? The master declared, according to the depositions of himself, and of the other witnesses, not only "that he *must* go," which it is said would be the same expression in *German*, as "that he *ought* to go," but also that "*he will go*" to Dieppe, and after due warning he is still found near the same place, with the ship's head towards *Dieppe*. Taking this representation to be true, as I am bound to do, it appears incredible to me, I confess, that he should, as he now asserts, have acted in this manner, without any intention of going into *Dieppe*. If, however, it is possible, that this assertion can be true, I have only to lament, as I have abundant occasion to do, the folly and obstinacy of masters, who will place themselves in situations, which it is impossible for the Court to admit to be innocent, without breaking down all the rules, on which alone the principle of blockade can be sustained. On these grounds I feel myself obliged to pronounce this vessel guilty of a breach of the blockade, and consequently subject to condemnation.

KARASAN,

KARASAN, YEUSEF.

Nov. 9th & 13th,
1804.

THIS was a case on a monition, calling on the master and owners of a *Gibraltar* privateer, to bring in the account of sales and the proceeds of a ship and cargo, captured in *October* 1797, and carried into the island of *Sardinia* (a). On the part of one of the owners of the privateer, a *release* was brought in, and it was prayed that the monition might be superseded as against him, and that he might be dismissed, on a suggestion "that he had settled with the claimants, according to the proportion of interest which he held in the privateer; that he had actually paid 5250 dollars, and had obtained a release and acquittance of all farther demands from the master, acting for himself, and under a full power of attorney, given for that purpose by the owners of the cargo."

A part owner of a Privateer not exempt from his general responsibility by compensation *pro tanto*, and a release of the claimant as to him.

In opposition to this prayer, The King's Advocate and Arnold contended—That the party alledged to having

(a) This case arose on the capture of a *Tunissian* Vessel, taken in *October* 1797, and carried into *Sardinia*. A suit was first instituted in the Admiralty Court of *Gibraltar*, calling on the captor, to proceed to adjudication, but the case was pronounced not to be within the jurisdiction of that Court. Proceedings were then commenced in the High Court of Admiralty, and a monition issued the 4th of *May* 1804, citing the master of the privateer to proceed to adjudication, and calling on the several owners and one surety to see proceedings. On the same day a farther monition was also decreed against the owners of the privateer, and against one surety, "to bring in the proceeds of the ship and cargo."

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Nov. 9th & 13th,
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given the release was not competent to release a part-owner of a privateer, from the general liability which by law attached upon him, and which might, in many instances, extend far beyond the amount of his particular interest in the ship.

On the other side, Laurence contended—That the release was as full and comprehensive in its terms as it could be made; it was given in the names of all interested in the claim, and under a special authority for that purpose, delegated to the master, and with a direct view to the present proceeding before the Court of Admiralty.—When the intention of the claimants to apply to the High Court of Admiralty was first intimated, the party had expressed a wish to make immediate compensation. He was entitled therefore, to as much protection as the Court could afford him, from the readiness which he had shewn to satisfy the demands of justice, by a voluntary and early reparation.

JUDGMENT.

Sir William Scott.—The question for the consideration of the Court is, whether this person can be dismissed from being a party in the suit; not whether he shall be decreed to pay the money, since the merits of the case are not at present before me. It is not denied that the *suit* must proceed against others, and that *some persons* may be held liable to costs and damages, for the acts which have been committed by the Master of the Privateer; but it is contended that this part-owner is entitled to be exonerated and released from all farther appearance, in virtue of a formal release

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lease executed to him by the claimant. I will not now enter into any discussion of the validity of the release, in respect to form; perhaps the objection on that point may not turn out to be material. Supposing the case to stand free of all objections of that kind, I am of opinion that the release cannot avail, to exempt this person from being held a party to the suit, to which all the owners of a Privateer are, in the first instance, liable, and not merely for their own shares respectively, but for the total amount of what may be awarded against the mall. (a)—The foreigner, who executed this release on payment of a share, was probably ignorant of this extensive protection which the law had given him. He likewise has a right to call upon them all, not only for reparation, but also for all the information in their possession. It is said that the information which can be derived from the answers of this person, as a party to the suit, may be obtained from him as a witness—Undoubtedly it might, if the Court could dismiss him from all farther observance of justice, and render him a person wholly uninterested, but that is more than I think myself authorized to do.

The Court rejected the prayer for the dismissal of this party, and decreed attachments on the other parties who had not made any return to the monition.

(a) So in Lord Stair's decisions of the Lords of Session of Scotland, 9th Feb. 1675, in the case of *Praris v. Martin*, v. 2. p. 319. The prayer of certain *part owners* to be dismissed on payment of their respective shares, was over-ruled; and it was held that all the owners of a privateer are responsible conjunctly and severally *in solidum*. In that collection of Reports may be seen many cases on prize questions, which appear to have been agitated on very just principles, and may be consulted with advantage, more especially with respect to the practice of those times.

Nov. 13th,
1804.

NOSTRA DE CONCEICAS, CUNHA.

Amelioration, as to ships purchased under an illegal title, without condemnation, allowed under the circumstances of the case—Notice that such allowance will not be continued.

THIS was a case of a *British* vessel captured by a *Dutch* privateer, and carried to the coast of *Africa*, and there sold to the present claimant, a subject of *Portugal*, without having been brought to legal adjudication. The ship was decreed to be restored to the former owner. An application being made on behalf of the neutral purchaser, that he might be allowed the amount of sums laid out upon the vessel.—

The Court observed—In a case like the present, where the invalidity of the title might not be known to the *Portuguese* purchaser, I should be unwilling that he should lose the benefit of any money which may have been actually expended in the improvement of the ship. I am the more inclined to make an allowance for amelioration in the present case, because it is perhaps not quite clear that the *Dutch* captor did not take his prize to some place on the coast of *Africa*, where something in the form of a condemnation might pass, though not in any Court regularly constituted for that purpose. If there shall appear to have been any actual amelioration, therefore, I shall direct the *Portuguese* purchaser to be reimbursed. At the same time neutral merchants must observe, that this is an allowance which the Court will not think itself bound to continue, after the invalidity of these titles has been so generally made known by the decrees of this Court, and of the Superior Court (a). If persons will accept ships

(a) *Proseverance*
Pelzer Lords,
10th August 1803.

ships in this manner, after such a notice, it must be at their own peril that they proceed to lay out money upon a title so notoriously invalid.

The
NOSTRA DE
CONCEPCAS.

Nov. 13th
1804.

THE BETSEY, WINPENNY.

Nov. 22d,
1804.

THIS was a case of an application made to the Court on the part of a claimant who had taken the goods on bail at an admitted value, to have the bail reduced to the actual value of the goods, on a suggestion that the sale had *not* produced so much, as the sum at which they had been appraised.

Bail for cargo
taken by claim-
ant, *not reduced*
to the amount of
the actual pro-
ceeds.

Court.—There seems to be no pretence for this application. The party took the cargo not merely as a *middle man*, as he has been described in argument, who was to be employed to sell to the best advantage for the use of the *jus habentium*.—It was to the claimant himself that the goods were delivered at his own desire, and at an agreed value, by which the amount of the interest in dispute was completely concluded. If the value had proved much greater than the appraised sum, the captor would have derived no benefit from the increase. The speculation in that event would have been advantageous to the claimant only; he would have brought in no more than the appraised value. The adventure being *unfavourable*, the same valuation

must

The
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must be adhered to, as equally binding *against* him. I have no hesitation in rejecting this prayer, and with costs (a).

(a) So, as to *salvage cases*, in the *Jonge Basjan, Sleight*, 17th Feb. 1806, in which a proportional salvage had been decreed. The owners had taken the cargo on bail, at an appraised value. An application was afterwards made to the Court to reduce the rate of salvage, on a suggestion that it exceeded the net proceeds, owing to the expences attending the sale.

The Court rejected the Petition.

So, in the *Graaff Bernstorff* April 3, 1805.—In respect to the expences attending the sale of a cargo taken on bail by the claimant, and afterwards condemned, it was objected on the part of the claimant that the Registrar and Merchants had refused to allow certain charges made for warehouse room, and expences attending the conversion of the property. But the Court overruled the objection, observing, I can have no hesitation as to any expences incurred after the property was taken on bail; The captor cannot be liable to any such charges. It was a free speculation on the part of the claimant to take the property at an appraised value, with all the charges attending it. As it appears that a sum of 1800*l.* has been retained in the hands of the claimant under the pretext of this objection, I shall over-rule the objection, and decree interest to be paid for the money so detained.

THE JONGE KLASSINA, BOL.

Nov. 30th,
1804.

THIS was a case on the national character of the claimant, under the particular circumstances of this transaction, and on the effect of a licence granted to Mr. *Ravie*, of *Birmingham*, "for the importation of certain goods from *Holland* into this country." The question was, whether it could operate to protect a shipment made by him, in person, in *Holland*, and under papers describing the firm of his house, as "*Ravie and Co. of Amsterdam.*"

National character of Mr. *Ravie*
—Licence to a *British* merchant to import, not extended to protect shipments made by him in person in an enemy's country, as a merchant of that country.

On the part of the Captors, the King's Advocate and Robinson.—The effect of the licence can extend no farther than to protect a shipment, made for the account of Mr. *Ravie* in his character of an *English* merchant. It was a licence to import in the character of a *British* merchant, and could not enure to protect a transaction conducted by the person himself in *Holland*, as a merchant of *Holland*, and in the character rather of an exporter from the country of the enemy, than merely as importer into this country. Mr. *R.* is shewn in the evidence to have been present in *Holland*; and though it is said that he was there only on his way from the *German* fairs, it no where appears what was the particular nature or duration of his residence in *Holland*. He had a known firm at *Amsterdam*, to which letters were addressed, and his business is stated by himself "to be carried on by his agent in *Amsterdam*, except when he is there himself." It may be true that he has an extensive establishment at *Birmingham*; but if he has at the same time a commercial establishment

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SINA.

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establishment in another country, his transactions must be referred respectively, as to their national character, to the country in which they originate. In this transaction he appears to have been conducting his concerns under the protection of the *Dutch* Government, and as a person incorporated in the commerce of *Holland*. Under these circumstances he must be taken as a *Dutch* exporter of these goods, rather than as the *British* importer, and the licence granted to him in the latter character, will not extend to protect his *interest* in a shipment made by him in his former capacity. The description of the property, in the bills of lading is, besides, at variance with the terms of the licence, which empower him "to import, &c. certain articles, *being his property*;" whereas the goods are stated in the bills of lading to *be coming for the account and risk of Mr. Berry of Topsham*.

On the part of Mr. Ravie, Laurence referred to the affidavits that had been brought in on the part of the claimant, and contended—That Mr Ravie was not to be considered as a merchant of Holland; that the shipment had been made by him on his return from the German fairs; that he had not any established domicile in Holland; that there was no ground to impute to him any other national character than that of a British merchant, in which character he had been before known in this Court, in transactions originating in his house of trade at Birmingham. On the second point, respecting the disagreement of the property with the terms of the licence, it was argued, that the goods were actually coming on the account and risk of Mr. Ravie, since it was a part of his agreement with the person at
Topsham,

Topsham, that Mr. *Ravie* should guarantee the goods until their arrival in a *British* port.

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JUDGMENT.

Sir William Scott.—This question arises on the claim of Mr. *Ravie*, describing himself as “*Ravie of Birmingham*,” for certain goods coming to be imported into this kingdom from *Holland* under the authority of a licence. In all cases of this kind, the terms of the licence must be considered, as the only authority under which the goods can be imported by a *British* subject from the enemy’s country; and I may here observe, that it would not be the disposition of this Court to narrow the operation of such a licence, more especially under the severe pressure which the commercial concerns of *British* merchants have sustained from the war. Mr. *Ravie* appears to be a person engaged very extensively in the manufactures of this country, in the employment of our artisans, and in the export and import trade of the country; and it will be to be lamented, if exertions so laudable and so prosperous should meet with any check from the effects of war. But if such a misfortune should have befallen him, I need not say, that it is out of the power of this Court to afford relief against the necessary conclusions of law. The province of this Court can extend no farther, than to pronounce, whether the transaction comes fairly and adequately within the terms of the licence, under which alone it can be supported.

The licence was granted to Mr. *Ravie* to import certain goods, “*being his property*.” On the question relating to *the property*, considering the terms on which the goods are now stated to have been shipped

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ped “*for Mr. Berry, but at the risk of Mr. Ravie during the voyage,*” I am disposed to hold that this provision of the licence, which refers to the description of property, has been sufficiently complied with. But it appears, that Mr. *Ravie* was not only the *importer*, but the *exporter* also ; that he was personally present in *Holland* superintending the shipment according to the evidence, as it is now explained, in the same manner as any other merchant of that country would have done. So the master describes him in the additional affidavit which has been permitted to be introduced. What is it that the broker does, on being employed by the master to procure a freight? He goes to Mr. *Ravie*, as a man would go to a known merchant of this place. Mr. *Ravie* appears to have been the shipper. He contracts with the broker, and is described in the charter-party as “*Ravie and Co. merchants at Amsterdam.*” Am I then at liberty to say that this is a transaction which comes fairly within the terms of the licence, or that it is lawful for any individual to engraft the character of *Dutch exporter* on a licence granted to him as a *British* merchant to *import*? If it could be shewn that there was any necessity, or any consideration of policy, that required such an indulgence, the proper mode would be, that it should be presented to the view of the Government, at the time when the licence is obtained; and then permission to that extent might be inserted in the terms of the licence itself. Without such a declaration of the intention of Government, for this Court to apply the licence to the protection of such a transaction as this is, *would be*, I think, to carry it far beyond the fair construction, which the terms of the
grant

grant will bear. I am far from imputing to Mr. *Ravie* any improper motive in this affair. A breach of native allegiance it could not be, as Mr. *Ravie* does not appear to be a native subject of this country. I will go farther and say, that there does not appear to have been an intention on his part, of violating any duties which he owed to this Country. The motive was, I dare say, merely *commercial*, and, perhaps, within his apprehension of what was permitted to him under the terms of his grant. But, I fear, that this is *his* exposition only, and not one which the law will allow me to entertain. If trade with the enemy is generally unlawful, it is not in the power of this Court to admit it, beyond the degree which is fairly described in the terms of the licence. The hardship of the case has been strongly pressed, on a representation that Mr. *Ravie* went to *Holland* only for the purpose of collecting debts, and on his return from the fair at *Frankfort*. The Court has looked anxiously into the evidence, to see on what ground such an assertion was founded; because if it had appeared that this was a solitary instance of engaging in *Dutch* commerce, the Court would be induced to strain hard to escape from the necessity of pronouncing the property subject to confiscation. Something of that kind, does appear, indeed, in the affidavits; but of the persons who make those affidavits, I must say, that they seem to know more of *Ravie's* affairs than Mr. *Ravie* himself. I have looked into his affidavit, and can discover nothing respecting the particular purpose of collecting debts. All that *he* says is, "that after the *Frankfort* fair he went to *Holland* " to settle
some

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some mercantile concerns." Those concerns might be all future arrangements. Without assenting to the principle, that a *British* merchant could, with strict propriety, go in any case into the enemy's country without the authority of the State, the Court might be disposed to exert the utmost indulgence that could be consistent with the rule of law, for the relief of a person, who had found himself in the enemy's country, *in transitu*, merely, and for occasional purposes only, not originally connected with this transaction. But when I look at Mr. *Ravie's* affidavit, I can find no grounds for considering his case as that of a man merely stepping over the line of demarcation, and making shipments only for the purpose of collecting his debts.

This brings me to the consideration of Mr. *Ravie's* national character. It is not said what is his native character, but it is much insisted on that he is settled in this country, and engaged in extensive manufactures here. Mr. *Ravie* must know, and those who have stated his case know perfectly well, that his meritorious establishment in this country, to the extent which I have stated, cannot be permitted to affect this question. A man may have mercantile concerns in two countries, and if he acts as a merchant of both, he must be liable to be considered as a subject of both, with regard to the transactions originating respectively in those countries. That he has no fixed counting-house in the enemy's country, will not be decisive: How much of the great mercantile concerns of this kingdom is carried on in coffee-houses? A very considerable portion of the great insurance bu-
siness

business is so conducted. It is indeed a vain idea, that a counting-house or fixed establishment is necessary to make a man a merchant of any place: If he is there himself, and acts as a merchant of that place, it is sufficient; and the mere want of a fixed counting-house there, will make no breach in the mercantile character which may well exist without it. Mr. *Ravie*'s own representation is, "that he went to *Holland* for the purpose of arranging his mercantile concerns, and that he has for a long time carried on trade and business at *Birmingham*." As to his business at *Birmingham*, I may dismiss the whole of that circumstance, as what cannot admit of a doubt. The question will still remain, whether he is not also a merchant of *Holland*, in this particular transaction? He says, "that he employs Mr. *V.* as his agent at *Amsterdam*, to receive letters, and that letters are addressed to him there to *Ravie* and company at *Amsterdam*." This circumstance has been contended to be parallel with the case of Mr. *Portalis*, who had agents at *Bordeaux*, and at various other places, whilst he himself was resident at *Neufchatel*. But there is this distinction which has been overlooked, that Mr. *Portalis* did not appear to have been personally present at *Bordeaux*; he might have agents in different parts of the world, but he himself was resident at *Neufchatel*. If he had been himself at *Bordeaux*, that fact might have made a very material difference in his case. What is the situation of Mr. *Ravie* in this respect? He says, "that he has employed agents at *Amsterdam* except at those times when he finds it convenient to go there," which may be three or five times in a year: At such times I am to suppose that
he

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he did not employ agents, but transacted his own business. What is meant by a *nominal firm* at that place, which I perceive in several passages of these affidavits, I am at a loss to understand, since Mr. *Ravie* appears to have been as substantially employed in the trade of *Amsterdam*, as any other mercantile firm of that place. The character in which he stands before the Court, in this particular transaction, corresponds exactly with this view of his general connexion with that place. The charter-party is brought not to Mr. *V.* his agent, but to *himself*, and he signs it as a merchant of *Amsterdam*. It would, I conceive, be too much for me to pronounce, that this can legally be done; or, in effect, that a man may go to the Enemy's Country, as often as he pleases, under the authority of a licence of this kind, and there act as a *Dutch* merchant, carrying on the export trade of that country. I feel, I hope, as much as other persons, for the difficulties under which the commerce of this country, and commercial men, may be placed by the events of war; but it is not in my power to bend the principles of law for their relief. If it is fit that such relief should be afforded, it must be given elsewhere and by higher powers. This Court has no authority to exercise such a discretion, but is under the painful necessity of pronouncing this property subject to condemnation.

THE CHARLOTTE, KOLTZENBERG.

Nov. 16th,
1804.

THIS was a case of a cargo of masts and spars, taken in a *Lubeck* ship, on a voyage from *Riga* to *Nantes*, being the produce of *Russia*, and claimed as the property of a merchant of that country.

On the part of the Captors, the King's Advocate and Laurence.—Masts, more particularly those of the large dimensions of the present cargo, are universally considered as articles *per se* contraband, without reference to the particular character of the port to which they are going. They are articles for military use, in a manufactured state, and stand in this respect, on a different footing from pitch, tar, and hemp, in regard to which, a general relaxation has been admitted in favour of merchants exporting such articles, as the produce and raw commodities of their own country. *Masts* have never been considered as within the range of this relaxation, unless excepted by particular stipulations of treaty. Between this country and *Russia*, a late treaty has distinctly provided a rule of law for questions of contraband; but that treaty will not extend to protect cargoes like the present, consisting of articles in their nature contraband, and *not on board a vessel of the exporting country*. It has been admitted in argument, in other cases, that the stipulation of former treaties with *Russia*, with respect to the carrying of contraband articles, regarded only the *navigation* of *Russia*, and was restricted to the case of *Russian* produce and property on board *Russian* ships. In a case (a), in which that

Contraband—
Masts, *Russian*
property and
produce, not
being on board
a *Russian* ship,
not within the
protection of the
Russian treaty.

(a) *Apello*,
Boscher, *supra*,
vol. iv. p. 158.

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topic had been adverted to, the Court expressed an opinion that the late treaty could not be held to have introduced any alteration on that point, but that it was to be considered as providing for the freedom of commerce, *only*, as connected with *the navigation of Russia*, that is, on board *Russian ships*. Indeed the whole tenor of those articles of the treaty which relate to this question will be found to refer to the situation of property on board *Russian ships*. The provisions on this subject are to be found in the third and fourth articles, which clearly point to the *immunities of Russian ships*. The third article stipulates for the freedom of commerce and navigation; "*that the ships of the neutral power may navigate freely to the enemy, &c.*" that the effects embarked on board *the neutral ships* shall be free, with the exception of *contraband of war*, and of enemies' property. Then follows an enumeration of *contraband*, excepting, however, "*such quantities of the said articles, as may be necessary for the defence of the ship,*" pointing, even in this particular enumeration, to the case of a *Russian ship*. In the conclusion of that article, the contracting parties enter into the most formal engagement "to renew the severest prohibitions to *their captains*, whether of ships of war or merchantmen, to take, keep, or conceal, on board *their ships* any of the articles which, in the terms of the present convention, may be reputed contraband." The tenor of such an engagement relates entirely to the immunities and obligations of *Russian ships*; and it cannot be contended that any relaxation in favour of articles *per se* contraband has been introduced by this treaty, except in connection with the navigation of *Russia*, or

on board *Russian* ships. It will be sufficient however, to advert to the decision of a late case before the Lords (a), in which articles of a similar kind, *masts*, on board a *Swedish* ship, from a port of *Russia* to *Cadiz*, and claimed as the property of Mr. *Schriboom*, a *Russian* merchant, and consul for the *Swedish* nation, were condemned and with costs, in affirmance of the sentence of the Court below. The present question, therefore, is a question concluded in this Court, not only by the general principle of law, but by the express decision of the superior Court in a case exactly similar.

The
CHARLOTTE.

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(a) *The Gracfen
Van Gothland*,
Aug. 19, 1803.

On the part of the claimants, Arnold and Robinson.

—It may be material, in the first instance, to correct a position which has been assumed in argument, on the other side, from an erroneous assertion of counsel, made in the *Apollo, Botcher*, (a) viz. That the former treaties with *Russia*, on this subject, referred only to the navigation of *Russia*; that is to *Russian* ships. If former treaties are consulted, it will be found, that in all of them the same or similar terms are used: the treaty of 1797, article 10, expresses "*commercer*," with exception of contraband; the treaty of 1785, 1766, "to come and trade freely with those States," with the exception of contraband; the treaty of the 2d December 1734, article 11. "*Aller Venir and Commercer*;" in the late treaty, freedom of commerce and navigation. The terms, therefore, of all the treaties between the two countries, are perfectly corresponding, and of the same import; and whatever the true construction may be, it is not to be assumed

(a) Adm. Rep.
vol. 4. p. 158.

The
CHARLOTTE.

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that there has been any *variation*, or that the *commerce* and *navigation* are to be inseparably connected in the interpretation of the present treaty, merely because the privilege was confined to the navigation only, and to *Russian ships* by former treaties. The fact is otherwise, the words of former treaties contain no such limitation. It will be material to enquire then, what has been the interpretation of those treaties, and the practice under it. It may be fit, however, previously to observe, that if a *limitation* had *anciently* existed, it would not be conclusive in the present case, inasmuch as the claimant would be entitled to the general principle, applicable to all cases of contraband, viz. that articles being the produce of the exporting country, and as such entitled to relaxation, are not deprived of the benefit of that relaxation, by being on board the ships of another country. This principle was much discussed, and deliberately announced as the rule of law, in the case of the *Apollo, Botcher*, in which a quantity of *Hemp*, in the situation of the present cargo, being *Russian* produce and property, on board a *Lubec ship*, was declared to be nevertheless within the protection of the relaxation, and restored to the *Russian* claimant. If it could be shewn, therefore, that all former treaties provided only for cases of articles on board *Russian* ships, it would not operate on the present question, since the privilege being greater under the general principle of law, it can not be supposed, that *Russia* intended to admit of closer *restrictions* than were applied to other nations. But there is no necessity to resort to the benefit of this reservation. The meaning of the older treaties, is best illustrated

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illustrated by the ancient practice which prevailed, upon solemn discussion, in this Court and in the Court of Appeal, soon after the first treaty, which contains any reference to this subject, that of *December 2d, 1734*. In the war of 1744, this question came solemnly before the Court. The general instructions delivered to cruizers in that war (18 *June 1744*,) had declared malts to be contraband (*a*). In 1747, in the case of the *Providentia*, *Boysen*, malts, going from *Riga* to *Brest*, *Port Louis*, *Rochfort*, *Nantes*, or *Bourdeaux*, on board a *Lubec* ship, but claimed by a *Russian* subject, were restored, and in a note now extant, of the judgment of the Court, the question was stated to be, whether naval stores, being the produce of the exporting country, were contraband. It was observed, that, by the existing treaty with *Russia*, such articles were not enumerated in the list of *contraband articles*, because they were the growth and produce of that country; that although they had been declared *contraband generally*, by the instructions of 1744, yet, as those instructions did not refer in any manner to the law between the two countries, as it stood previously on the treaty, they could not be taken to have abrogated that treaty; consequently, that such articles

(*a*) 5 Art. "That all sorts of fire-works, and things thereto belonging, as cannons, muskets, mortars, petards, bombs, grenades, faucifles, pecrausen, carriages, rests, bandaliers, powder, match saltpetre, bullets, pikes, swords, head-pieces, cuirasses, halberds, horses, saddles, holsters, belts, sail-work, rigging, cables, cordage masts, head, pitch, tar, hemp, together with all other equipage that serves for sea or land, laden in *Danish* or *Swedish* ships, or ships belonging to neutral countries, and bound to the enemies' country, are accounted contraband goods."

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were not to be deemed contraband." It may be said however of that case, that the *ship* (though the point of property seems to have been doubtful) was not clearly a ship of another country, and might be taken as a *Russian* ship, and in that view the case would not be applicable to the present question. The case is cited chiefly to shew the manner in which the reasoning upon this question, with regard to *Russia*, operated generally. From another case, of an earlier date, it will appear, that the distinction as to the ship was of no effect. The case of the *Vierge Mary*, (Admiralty, 14 Dec. 1744,) was precisely in point, being a case of staves and timber of other description, and forty large masts, on board a *Dantzick* ship, and going to *France*. The ship and cargo were restored in the Court of Admiralty. The case was appealed; and the *præsertim* of the Appeal on the part of the captor stated, "that it was a cargo consisting of naval stores, *masts*, and other materials proper for shipping." But it seems that the law on the treaty was so clear, that this argument was not urged at the hearing. Farther proof was ordered of the property, and it was finally restored; and in a note extant of that case, it is said, that the point of contraband goods and the privilege of the treaty were not entered upon. It seems then to have been taken as too clear in the treaty to admit of argument. In a subsequent case—the *Fortuna de la Mer*. Sir G. Lee spoke of it in these terms: "The *Vierge Mary* turned upon the article of the treaty with *Russia*;" and again, Sir Edmund Simpson, "for the *Vierge Mary*, a *Dantzick* ship, with a *Russian* cargo, were restored on the treaty." The reasoning of those times in which the question first arose upon the then recent stipulation,

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is to be taken under the general rule of construction, as the best interpretation of the meaning of the *treaty*. By a view of these precedents, it will appear that the construction which is now attempted to be put upon the present treaty derives no support from the practice of those times. On the contrary, the authority of those times is in direct opposition to the restriction now contended for, and affords a strong ground of presumption, that *Russia* did not in this treaty mean to convey away any rights which had been before allowed to her trade, farther than the terms of the treaty necessarily import. The treaty itself cannot be said to make any such renunciation. The articles on this head are few in number, and are shortly drawn up. They seem in their obvious meaning to point equally to the *interests of commerce and navigation, referenda singula singulis*. To consider the terms as applicable only to the joint state of *Russian* commerce on board *Russian* ships would be a harsh construction, in point of language, and still more so, with regard to the equity of the benefit which is the object of the contract. To limit the privilege to cases of *Russian* cargoes on board *Russian* ships *alone*, would be to reduce the number of such *cargoes* without any assignable reason in law or policy. But it is said that this is a decided question; and the case of the *Graeffen Van Gottland* before the Lords is cited as a conclusive authority. The particular grounds of that decision were not stated by the Court of Appeal. It would therefore be impertinent to conjecture how far they might bear a necessary application to the circumstances of the present case. From some not immaterial facts of that case, however, it may be allowed to shew that there

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might be grounds of condemnation, which do not occur in the present case. That was a case of a shipment of masts during the late war in 1797, a war, in the commencement of which *Russia* had taken a more than ordinary interest, and *had* pledged herself, and indeed exacted an engagement from other powers (*a*), that all *supplies* should be prevented from being carried to the *enemy*. A shipment of such articles to the port of an enemy would be, therefore, in violation of a particular engagement applying only to that war. There was besides this additional circumstance of aggravation attending that shipment—that it was consigned to the public arsenal of the enemy—a mode of consignment which always furnishes some inference against the claim of neutral property, and on the question of law is considered in a more unfavourable view than mere mercantile consignments. Upon the whole it is submitted, that the authority of that case is not necessarily conclusive against the present claim; that the words of the treaty import no restriction; and that the relaxation applied to articles of native growth

(*a*) 25th May, 1793. Article 3d. " Their said Majesties reciprocally engage to shut all their ports against *French* Ships, not to permit the exportation, in any case, from their said ports for *France*, of any military or naval stores, or corn, grain, salt, meal, or other provisions; and to take all other measures in their power for injuring the commerce of *France*, and for bringing her by such means by just conditions of peace."

Article 4th. " Their Majesties engage to unite all their efforts to prevent other powers, not implicated in this war, from giving, on this occasion of common concern to every civilized State, any protection whatever, directly or indirectly, in consequence of their neutrality to the commerce or property of the *French*, on the sea, or in the ports of *France*."

and

and produce, does in principle and practice extend to the present case.

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JUDGMENT.

Sir William Scott.—This case has been argued much at length on the operation of the treaty, and on the authority of former practice; and it certainly presents a question of considerable importance. But it will not be necessary or proper for me to travel much into the argument, because, if there is a decision of the Superior Court, so recent as 1803, on a similar point, it will be conclusive upon my judgment, and I shall have only to follow the rule of law there laid down, and to act under the authority of that decision. Let us see then whether the cases are so far parallel cases, as to be subject to an application of the same principle. The *Graeffen Van Gottland* was a shipment of masts to *Cadiz* in a *Swedish* ship, and, as the master appears to have said in his depositions, “to be delivered to private consignment.” This is a shipment of similar articles, going in a *Lubec* ship to *Nantes*. The two cases have this circumstance in common, then, that the claimants are merchants of *Russia*, exporting articles of the same kind to the enemy, not in the vehicles of their own country. Unless there are other circumstances to distinguish the cases, the decision of the Lords upon the former case must be the *guide*, which this Court would be bound to follow. Then what are the distinctions pointed out? It is said that the claimant in that instance was the *Swedish* Consul in *Russia*; but that circumstance could have made no difference, since it must have been *familiar* to all who had to *judge* of that case, that his character

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character of Consul to a foreign nation could not vary the principle that was to be applied to it. As a person resident in *Russia*, he could be considered in no other light than other merchants of the country. It is then said, that the cargo was going to the public arsenal of the *enemy*.—It was going to *Cadiz*, which is a place of great military equipment, but it is a place of great mercantile equipment also ; and it does not appear, I think, exactly as it has been represented, that those articles were to be delivered to the public arsenal of the State. What has been said on the other side is, I think, true, that the nature of the port is not material ; since masts, if they are to be considered as contraband, which they will be unless protected by treaty, are so, without reference to the nature of the port, and equally, whether bound to a mercantile port only, or to a port of naval military equipment. The consequences of the supply may be nearly the same in either case. If sent to a mercantile port, they may be there applied to immediate use in the equipment of privateers, or they may be conveyed from *Nantes* to *Brest*, and there become subservient to every purpose, to which they could have been applied if going directly to a port of military equipment. The only other distinction is, that the decision alluded to, passed on a capture of the late war in 1797, when this Country and *Russia* were bound by a particular convention to a stricter co-operation in the war *against France* : But the destination of the *Græffen Van Gottland* was not to *France*, but to *Spain*, which country was by no manner affected by the Convention of 1793. It has appeared, I think, in numerous instances, that the commercial intercourse between *Russia* and *Spain* was not

not interrupted, but that there was a considerable trade going on between the two countries during the whole war. These distinctions then are insufficient to vary the principle of law, which I feel myself bound to apply under the authority of the Superior Court. Without going into the antecedent history of the law on this question, I must consider the authority of this recent case decided by the Superior Court as binding on me. That judgment must be supposed to have been formed with reference to former authorities ; and it is not even now contended, on the part of the claimant, that the late treaty of 1801 puts the commerce of *Russia*, with respect to these articles, on a more favourable footing than it was before. The effect of that decision is conclusive on me, and I have no hesitation in pronouncing this cargo subject to condemnation.

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THE WIGHT, FORD.

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THIS was a case of salvage arising on the re-capture of a vessel by a convoying ship, within a short time after the capture, and before she had been carried out of sight. The facts of the case were, that the *Wight* was sailing under the convey of the *Thistle*, on a voyage from *Zante* to *London* ; that in passing the narrow channel between *Cephalonia* and *Ithaca*, the whole convoy was becalmed, and, whilst in this situation, a privateer rowed out from the land by means of sweeps and made a capture of the *Wight*. On signal being made, the *Thistle* immediately put out her boats, which pursued

Salvage on re-capture, by a convoying ship, granted.

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purfued the privat  er, and within an hour or two retook the *Wight*, and alfo made a capture of the *privateer*, with the lofs of one man.

On the part of the captor, the King's Advocate and Arnold.—There is no reason to diftinguifh this cafe from other cafes of re-capture, on which falvage is directed to be given by the Prize Act. That the recaptor was the veffel, under whofe protection the prize had been originally failing, will not vary the cafe, fo as to defeat the principle of law which operates in ordinary cafes. It is true that fome latitude of difcretion feems to have been exercifed on this point, in certain cafes that have been formerly determined in this Court. In the *William* in 1803 no falvage was decreed; but in other cafes, in the *Creighton*, 29 January 1780, and in the *St. George*, 15th July 1785, falvage was given. And it is material to obferve, that the principle on which the Court proceeded in thefe cafes, where falvage *was given*, appears to have received confirmation from the Court of Appeal, in the cafe of the *Hinchinbrook*, 28th January 1786, in which falvage was at firft refufed in the Court of Admiralty; but that fentence was reverfed, and falvage was afterwards decreed by the Lords of Appeal.

On the part of the Owners, Laurence and Robinfon. It is not to be denied that cafes may occur, in which convoying fhips will not be precluded from claiming falvage, on the re-capture of fhips originally under their protection; but on the other hand it would be obviously unequitable, and attended with very inju-

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rious consequences, to hold out such a reward to *every act* of recapture, or rather of *assistance* afforded against the common enemy in one identical contest. The true line of distinction seems to be, whether the original relation between the convoying ship, and the vessel in question, had been interrupted and broken by separation or not? The case which has been principally relied on before the Lords, the *Hinchinbrook*, perfectly accords with this distinction, and affords no precedent for a claim of salvage under the circumstances of the present case. That vessel had come to anchor on the outside of the convoying vessel, with an intention of going farther in, but drifted to sea, and was captured the next day by a force superior to that of the convoying ship, and after *that ship* had maintained a combat, and had done all that was in her power for the protection of the vessel. Whether the capture was within sight of the convoying ship, or not, was not distinctly ascertained, but the re-capture did not take place till the next day, and was in no manner connected with the original measures of defence. The relation of convoy had been entirely broken, and there could be no reason why the convoying ship, falling in with the vessel again after she had been completely in the hands of the enemy, should not be entitled to salvage, as well as any other vessel that had originally borne no relation to her. But what are the circumstances of this case? Here is a merchant ship *becalmed* within sight of the vessel under whose protection she is placed—The boat of a privateer takes advantage of the *calm*, and makes a *temporary seizure*. The assistance which the convoying vessel would have been bound to give, in the way of preventing the capture, if she herself could have

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have moved, could be given only by the means of her *boats*. If they did not arrive till the crew of the privateer had gained a temporary possession, that accidental circumstance cannot be deemed sufficient to alter the nature of the assistance given, nor make that a re-capture, which, in fact, could only be considered as a continuation of the *combat*, on the part of ships associated together for mutual service.—This rule of interpretation seems to result from the nature of association in common danger, and it becomes still more reasonable and imperative, since a late Act, 43d Geo. 3d. c. 57, § 10, has not left to merchant vessels any option on this matter, but lays an obligation upon them to put themselves under the protection of convoy, and imposes upon them a tax for the assistance which they are supposed to receive. Under such circumstances they acquire a more complete right to all the protection which can possibly be given, without encroaching on the general duties upon which the convoying ship is employed. The words of that Act point to such a case as the present, as being within the protection of the convoying ship, on the *original terms*, and without raising a case for remuneration, since it is there directed, “that ships under convoy, if they are in danger of being taken possession of by an enemy, shall make signals to the ships of war *under whose protection they are sailing, &c.*”

JUDGMENT.

Sir William Scott.—This case comes before me upon an alleged act of recapture performed by the *Thysbe*, who had a number of merchant vessels under her convoy. One was captured by the enemy, and was afterwards

retaken by the *Thiſbe*; and for that ſervice the *Thiſbe* now ſtands before the Court, demanding the ſalvage which is allowed to King's ſhips on ordinary occaſions by the Prize Act. The firſt queſtion that ariſes is, Whether a convoying ſhip may be entitled to ſalvage from ſhips under her protection? That queſtion has, I think, been decided by the authority of the caſe of the *Hinchinbrook*, which is binding on me; becauſe it was there laid down, that the relation which had ſubſiſted between the convoying ſhip, and thoſe under her care, would not take the caſe out of the general provisions of the Prize Act. I conſider that to have been the ancient doctrine of this Court; and it was, I think, recognized as ſuch by the deciſions of my Predeceſſor, becauſe he ſeemed to hold that the demand might generally be conſidered as fairly within the operation of the Act; although he determined that, under the particular circumſtances of the caſe then before him, no ſalvage was due. He entered, I recollect, pretty fully into the circumſtances of that caſe, and concluded, that there had been ſome neglect on the part of the convoying ſhip, which would defeat the right of the ſalvors. The Court of Appeal was of opinion that no ſuch imputation was raiſed againſt the convoying ſhip by the facts of the caſe; and farther, that ſuch a queſtion, if it aroſe in fact, was a matter to be diſcuſſed in another form, and was not fit to be introduced in a civil cauſe of this nature, to repel a demand to which the re-captor would be entitled, on the general principle of law. It would indeed, as it was then obſerved, be attended with very great injuſtice to the character of naval officers, if the propriety of their conduct on ſuch occaſions could be brought into diſcuſſion incidentally in this manner; and I advert to
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this consideration more particularly, because I perceive that an insinuation of improper conduct has also been introduced into the present *case*.—But under the authority of the *Hinchinbrook*, I think myself warranted to consider it as a charge to which this Court will not attend, till otherwise established. If a complaint was gravely preferred and substantiated elsewhere, on a proper representation to the Lords of the Admiralty, it might be competent to this Court to say, that no claim to reward should be grounded on an act, thus pronounced to be an act of misconduct by a tribunal properly qualified to decide upon it. But to admit such accusations in this form, would be attended with great injustice to the naval officer whose character was implicated in the charge, and would be productive of great inconvenience to the Court. If I was to admit the insinuation in any degree, I must also receive exculpatory evidence on the other side, and that would be to let myself out to the practice of trying a criminal case throughout, which was so justly reprobated by the Superior Court on the former occasion. The only material question for me to consider then, is, Whether there was such a capture made by the enemy as would found a case of *re-capture*. Many cases might be put of the effect of immediate acts of re-capture; to shew, that it is by no means necessary that the possession by the enemy should be *long* maintained, or at any particular distance from the convoying ship. The question will always be, Whether it was an effectual possession, and such as would suspend the relation of the convoying ship; *not*, Whether it is a *complete* and firm possession, which, for some purposes, is, in contemplation of law, not held to be effected, till the prize is carried *infra prasidia*? The rule of *infra prasidia*, however, is certainly not the measure

measure to be applied to questions of this kind : The very clause of the Prize Act alludes to cases of salvage, in which no such complete possession is supposed, since it speaks of vessels being re-captured, and permitted to continue on their original voyage. As little can it be contended that the vessel should have been out of fight, to found a case of re-capture ; it will be sufficient, if there has been that complete and absolute possession, which supercedes the authority of the convoying ship ; and such a possession must have been maintained for some time in the present instance. Every act of possession was exercised ; the master was taken out ; the vessel was completely manned with as many of the captor's crew, as were sufficient to overpower all resistance, and the vessel was taken in tow by the enemy. By these acts the former relation subsisting between this vessel and the convoying ship was necessarily suspended. A ship in possession of the enemy can obey no signal, nor support its former duties and subordination to the convoying ship. There might still remain an obligation on the part of the convoying ship to attempt the re-capture, as far as it could be done consistently with the safety of the other vessels under her protection. Such a duty would result from the injunctions of the Prize Act, which provides a reward for the recaptor, when the service is effected, and cannot therefore be intended to preclude the demand of salvage, though the service rendered to the individual by the recaptor, may be no more than a sense of public duty would otherwise require from him. The capture is, I think, proved to have been sufficiently completed ; and unless I could go to the length of holding that there must be a firm possession, and a bringing *in-fra*

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presidia, I must pronounce this vessel to have been recovered from a situation, which has been decided to be sufficient to support the claim of salvage by the decision of the Superior Court.

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THE JONGE BASTIAAN, STEYTING.

(Instance Court.)

Salvage in Distress—Amount at which the action was at first entered, not binding on the Court as to the quantum, &c.

THIS was a case of salvage on derelict, for the recovery of a ship which had struck upon a rock, near *Harwich*, had lost her rudder and beat in her bottom, and, being deserted by her crew, was warped off by the *William and Mary smack*, with great danger and peril. After she had been so brought off, and placed in such a situation that the master was able to take away some bullion, which composed part of the cargo, the vessel sunk, from the damage which she had received, but was afterwards weighed up, and brought to *Harwich* by six other *smacks*, with great and continued exertions through five weeks. The value of the property saved was stated to be about 3,400l.

On the part of the Salvors—it was represented to have been a service of very great merit, and it was prayed that the Court would think the salvors entitled to a very liberal remuneration.

On this point, Arnold, for the Owners, objected—That the action had been entered only for the amount of 800l. and that the Court could not grant a salvage exceeding that sum.

On

On the other side, it was answered, that the action was originally entered only on the part of the first salvors, and that other salvors could not be concluded by any amount that they might affix to their action; but that the objection was untenable even as against them, since the owners would be equally answerable if no bail had been taken.

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JUDGMENT.

Sir William Scott.—The whole matter is before the Court, and I think the Court is by no means limited by any particular demand of the parties. This is a case of salvage of extraordinary merit, and of very long continuance. It was attended with very great danger, and was carried on in opposition to the opinion of the master himself, who represented the recovery of the vessel to be totally impracticable, and discouraged the parties from persevering in the attempt at the peril of their lives. It appears that the vessel was stuck fast upon a rock, with her bottom beaten in, and her rudder lost, when the first salvors went to her assistance, in a very heavy sea, and succeeded in warping her off. She sunk afterwards, it is true; but it is not on that account to be said that the first salvors had lost her again, or that they had abandoned their interest in her. They did not stay by the vessel; but it cannot be supposed that having risked so much for her recovery, they meant to desert her, whilst others were employed in their fight, in weighing her up and in saving the cargo. If they took no part in those exertions, it could only be because they perceived, that the persons employed in that service would perform it as well without them. They had

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been the immediate instruments of saving her from her original danger, and of bringing her to the place, where their other parties were enabled to complete her recovery. I am inclined to throw the salvage for the former, as well as the latter services, into hotch-pot, and to give all the persons concerned equal shares. The persons employed are many, being the crews of six or seven smacks. I shall direct them all to share alike, giving the owners and masters of the smacks a double share, and one person, whose leg was broken in the service, three shares.

On the part of the Owners. Arnold then objected—That the salvage should be given only to the amount of the cargo fished up; and *that* the bullion, which the master had taken away with him, should not contribute.—But the Court over-ruled that objection, and pronounced for a salvage of two-thirds of the whole property.

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On a subsequent day (a), an application was made to the Court to reduce the rate of salvage, as to certain articles composing the claim of one proprietor, on a suggestion that the actual proceeds did not amount to so much as the appraised estimate. On the other side it was contended, that the parties had taken the property at *bail*, and were concluded by that valuation; that it was according to the amount of that bail that the salvors demand was to be satisfied.

The Court rejected the Application, and directed the former decree to be carried into execution.

THE RICHMOND, BRATTEL.

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THIS was a case of an *American* vessel, seized in port by order of the Governor of *St. Helena*, and proceeded against as prize to the King in his Office of Admiralty, on the ground that she was going under a false destination to the *Isle of France*, with articles of a contraband nature concealed on board, and with a view of selling the vessel there, as a vessel well adapted for a ship of war, and for the service of privateering.

Contraband—
Pitch and tar
concealed on a
destination to
the *Isle of France*
—Ship and cargo
condemned.

The case was argued much at length, as to the effect of the evidence on these points.

JUDGMENT,

Sir William Scott.—This is a ship which is claimed as an *American* vessel, by the master, describing himself as part-owner, in conjunction with another person, who is also a citizen of *America*. In an affidavit, which enters very minutely into the history of the voyage, he states, “that the vessel sailed on a destination to *St. Helena*, from thence to *Mozambique*, on the coast of *Africa*, with a design of proceeding afterwards with a cargo of slaves to the *Havannah*, where the ship was to have been sold, having been originally purchased there, though built in *America*.” The assumed voyage, on this representation, was for the purpose of procuring slaves, a trade which, I am at liberty to observe, is strongly discountenanced by the laws of *America*, since it was but very lately, that a Proctor appeared in the Court of Appeal, intimating an intention, on the part of the *American* Government, to interpose a claim for the proceeds of all cargoes of

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slaves that should be decreed to be restored to *American* subjects, as property engaged in a trade, which is strictly prohibited by the laws of that Country. I may, I think, without impropriety, advert to this fact so conveyed to the knowledge of the Court.

All the formal papers on board express a destination to the *Isle of France*; but the master states, "that there was no original intention of going to that port; that as a clearance could not be expressed to *Mozambique*, owing to the restriction of the *American* laws as to such a trade, the *Isle of France* was put in as a convenient place, on that account, and also for the purpose of avoiding the cruizers that are very numerous off *Mozambique*." In conformity to this representation, there was an agreement on board, stating the voyage to be to *St. Helena* and *Mozambique*. There are also some instructions, purporting to be drawn up at sea by the master, for the direction of any person who might succeed to the command, in case of any accident that might happen to himself. These express the destination to be to *St. Helena*, and from thence to *Mozambique*; and the mariner's contract describes the voyage to have been to *St. Helena* and other places in the *Indian* Seas. These three papers hold out a destination to *Mozambique*; but all the other papers on board describe the voyage to have been to the *Isle of France*, though, according to the master's deposition on the 29th interrogatory, there was no original intention of going there. It does turn out, however, in fact, that at the time of seizure, the vessel was actually going to the *Isle of France*, and that she was unmoored for the purpose of proceeding on that destination, having obtained a clearance for that place from the Governor of *St.*

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St. Helena. At what time this intention was taken up does not appear ; there is no notice taken of it in the master's affidavit, in which he had an opportunity of explaining all the changes that might have taken place in his mind : There is no mention of it in the provisional instructions, prepared during the voyage by the master himself, though it certainly must have occurred to him, that though he might expect to dispose of his cargo at *St. Helena*, it was still possible that he might be disappointed ; and it would have been but a natural precaution, that he should have provided for such an event. Connecting these circumstances together, that the original clearance was to the *Isle of France*, that at the time of the seizure the ship was actually going thither, and that it is left in perfect obscurity at what time that intention was taken up, it is difficult not to consider the *Isle of France* as the *possible* port of destination of this vessel according to the original intention—I say, as *the possible port*, at least, if not *the principal*, and *absolute port* of destination of the original voyage. It cannot be denied, undoubtedly, that an *American* ship might go to *St. Helena*, and from thence to the *Isle of France*, or any other port of the enemy, *provided the cargo was of an innocent nature*. If, on the contrary, the cargo was of a noxious character, the circumstance of merely touching at an *English* port, would not alter the nature of a voyage in itself illegal. It becomes, then, material to consider what was the nature of the cargo. It consisted partly of provisions, which are certainly innocent. But there were likewise on board forty-two barrels of pitch and tar, which, whatever might have been the value of them in *America*, cannot be represented as an inconsiderable quantity,

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tity, with respect to the market to which it was going. This quantity of pitch and tar is totally dissembled in all the papers, in the bills of lading and manifest ; and yet it is perfectly clear, that it composed a part of the cargo, since it was so described, in the declaration made at *St. Helena*, for the purpose of obtaining permission to sell. What could have been the reason of this concealment ? It must have been owing to the nature of the articles. If they had been merely stores they might have been disclosed ; but if they were considered as part of the cargo, *then*, indeed, it is easy to perceive a reason for the concealment. In the first place, it would be necessary to conceal them from the *American* custom-house at the exportation, as prohibited articles going on a destination to a port of a Belligerent, contrary to the engagements of treaty subsisting between the United States and the Enemy of that Belligerent. It would be necessary also to dissemble both to *English* and to *French* cruizers, since, whether going to an *English* or to a *French* port, they would be liable to seizure by the cruizers of either Country respectively, who would have a right to consider such supplies carried to an enemy as illegal by the law of nations, and by the particular stipulations of treaty. It is asked, what was to be done under such difficulties ? The answer is plain and obvious :—Carry as much as is necessary for your own use, and no more, in violation of the obligations of your country, for any prospect of advantage to yourself. It has been almost admitted in argument, as indeed it could not be denied, that if the vessel had been met by a *British* cruiser, on the former part of the voyage, she would have been subject to condemnation ; since the avowed destination in the papers was to the *Isle of France*, with a quantity of
pitch

pitch and tar, being contraband articles, on board, and concealed in all the papers relative to the cargo. If she had been met by a *British* cruizer, it is impossible to deny, that the ship and whole cargo, belonging to the same owner, would have been subject to condemnation, without admitting one word to be urged in the way of apology or defence.

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Under these circumstances, the ship comes to *St. Helena*, on the 23d of *July*, and the master almost immediately requests permission to sell part of the cargo, or at least so much as might enable him to clear his decks. On this part of the case, I cannot help observing, on the very short time which it seems to have taken to accomplish this object. On the 24th permission is given; on the 29th the sale is all over, and the vessel is preparing to go away. *St. Helena*, I am aware, is a small place, and it might not take many days to ascertain the state of the market. But the cargo must have been taken out, because it appears that twelve barrels of tar, which lay at the bottom, were disposed of; or if it is suggested that those twelve barrels must have been on the deck, and no more, it will not add much to the favourable appearance of this transaction. So early as the 29th of *July* it is manifest from the master's own declaration, that the resolution was entertained of going to the *Isle of France*, though it does not appear exactly at what time the intention was first formed, and it is denied to have made a part of the original plan. About this time, the conversation and conduct of the master began to excite the attention of the Governor, and in a manner which does seem to call for some observation from me. It appears, that the vessel was originally built for a ship of war, and was easily convertible to warlike

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warlike purposes ; and it is established (a) in evidence, that the master conversed with several persons on this subject, and disclosed an intention of selling her at the *Ile of France*. The conversation which the master is reported to have held, was to this effect : “ That he heard that he was suspected by the Governor, for having said that he would sell his ship at the *Ile of France*, that he should have no objection to repeat the same to the Governor himself, for such ships were much wanted, and he should sell her well for a privateer, and buy another upon advantageous terms.” The only objection that is made to this evidence is, that it comes from persons examined in an irregular manner. In admitting such evidence to be read, the Court would certainly not hold itself bound by it, in the same degree, as by evidence taken in the usual and regular mode, but it would have been a great satisfaction to the Court, to have seen any disclaimer of the imputation on the part of the master. No notice is taken of it in his affidavit, or in the letter which he wrote to the Governor ; and though the Governor’s letter to him had expressly charged him with this conduct, as the ground of his detention, no denial or contradiction is opposed to it in the master’s answer. Nothing appears there but what is perfectly consistent with his declaration, “ That he would repeat the same thing to

(a) The examinations taken at *St. Helena* contained the depositions of several persons of character and reputation in that place, as to the conduct and declarations of the master.—It was objected against the evidence, that it was irregularly taken, and from persons who were in no manner competent to be introduced as witnesses in a prize cause in the first instance. But owing to the peculiar nature of the case, the Court permitted the depositions to be read, subject to all observation.

the

the Governor himself." Now I cannot admit, that such a conversation was proper to be repeated, or that it did not call for some notice and reprehension from the Governor. Here was an avowed intention of going to sell a ship to a belligerent; which, in time of war, is at least a very suspicious act—and to do a great deal more, to sell a ship which the neutral owner knew to be peculiarly adapted for purposes of war, and with a declared expectation that it would be hostilely employed against this country. It cannot surely, under any point of view, but be considered as a very hostile act, to be carrying a supply of a most powerful instrument of mischief, of contraband ready made up(a), to the enemy for hostile use, and intended for that use by the seller, and with an avowed knowledge that it would be so applied. It is not altogether improper to observe, also, on the manner in which this intention was declared; since the malignant nature of such a purpose was not a little increased by the indecent levity with which the master expressed himself, "that she would be seen *playing round the East India Company's ships in the Bay of Bengal next season.*" It is surely no breach of charity to impute the most unfavourable intentions to such a conduct; and if transactions are in themselves of a questionable nature, such declarations are quite sufficient to determine their true colour and complexion. There was also another act of improper behaviour, in the communication which this master held with the *French* prisoners at *St. Helena*, and in taking letters from them to be delivered at the *Isle of France*. In his affidavit he says that among the

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(a) In the case of the *Brutus*, *Rutherford*, Lords, *July 27, 1804*, a ship, recently built for war, as not fit for commerce, and going to the *Havannah* to be sold, was condemned as contraband. See farther note in the Appendix.

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papers were some letters which he openly received in the company of an officer of a *British East India* ship; that, they were delivered up on the 2d of *August*, and returned to him with an assurance from the *British* officers that they were perfectly honourable; and that he had received them knowing nothing of their contents." They were addressed to persons in the highest official situations at the *Ile of France*, both civil and military, to whom communications of a political tendency were likely to be made; and if any such assurance was given to him, that there was nothing *improper* in taking such letters, I think it was rather *improperly* given, because I cannot but consider it to have been an act of great indiscretion in the person, who took these letters, under such circumstances as are here described, without previous permission, and under a total ignorance of their contents. The Governor's letter, I perceive, complains of this conduct; and I cannot but consider it to have been an act of very officious and undue interference on the part of a neutral master.

The ship was seized by the order of the Governor on the 1st of *August*, and from that time the hand of force was upon her. She was not restored to the claimant, nor left at liberty to proceed on her voyage after that time. A negotiation, it seems, had originally commenced for the purchase of some of the provisions by way of pre-emption; and on an understanding founded on the repeated representation of the master, that there were not more than nine or ten barrels of tar on board, which the Governor consented to take. On proceeding to the execution of this agreement, the fact turned out to be, that there were *twenty-nine* barrels on board; and the only answer

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fewer or apology that is made for this excess is, that the mate had deceived the master, as to the quantity before sold. Could this be the fact? Here is a noxious article found on board; and it is impossible that the master should not have known how much he had on board when he left *America*. He was indeed bound to know it, and cannot be heard to aver an ignorance of that fact; since there would be an end of the treaty, if a master could be allowed to say, I am going to a belligerent port, but I do not know what I carry; and by that ignorance could be admitted to justify the carrying of contraband. The excuse is equally inadmissible, that he did not know how much remained unfold. If he was going to the *Ile of France*, he was bound also to know how much he had on board at that time; otherwise a master would have nothing to do but to touch at an *English* port, and under the cover of ignorance carry whatever he pleased to the enemy. The very stipulations of treaty estop him from pleading ignorance in such a case. But it is said, that he could have no fraudulent intention, because, as he had entered into an agreement that the Governor should take the whole cargo, the fact would speedily appear that he had so many barrels of pitch and tar on board. It may be asked, Why then did the mate deceive him? If it was a matter not to be concealed, why was any deceit practised about it? In the next place it is to be observed, that he had reported the smaller quantity to the Governor, when he applied for a permission to clear out to the *Ile of France*, and having made this declaration he might think himself bound to adhere to it; or he might hope that upon an agreement to take the whole cargo, the excess of quantity would not be rigorously examined. The fact, however,

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however, proved otherwise : In proceeding to unliver the cargo, the discovery is made, that there were twenty-nine barrels on board ; an immediate alarm is taken, the unlivery is discontinued, and the Governor informs the master that he cannot be permitted to proceed farther in the prosecution of his voyage to the *Isle of France*. At the same time a proposal is made to purchase the vessel ; but this offer afterwards went off on a dispute about the terms.

Upon this collection of facts, three questions arise : *first*, Whether this quantity of pitch and tar could be lawfully carried to the *Isle of France*, more especially connected as it was with an intention of selling the ship herself also, for purposes of war, in the enemy's port ? This question will depend in some measure upon another, Whether the quantity could be considered as intended for the ship's use, and only as stores ? Now I cannot but think that it was more than can fairly be considered as stores ? Persons are not, under the pretence of a voyage round the world, to carry as much as they please of articles of this noxious nature, and then sell them at different ports, where they may immediately become convertible to purposes of war. The term *stores*, is to be liberally interpreted ; but still it must be so understood, as to be capable of something like a definitive construction. Twelve barrels had been before disposed of at *St. Helena* as part of the cargo, and therefore it is quite impossible to suppose that the whole quantity was originally intended as *stores*. When it is connected with the act of concealment of the quantity on board, the inference becomes more strong, that the remainder was likewise intended for the purpose of sale at the *Isle of France*. It may be asked, what a person was to do in
this

this situation, meaning to act fairly, and being disappointed of selling the whole quantity at *St. Helena*? The answer is obvious, He ought to have declared the quantity, and to have requested permission to sell or deposit for sale such part as exceeded the proportion of stores upon the island. Such a precaution will appear still more reasonable, when we are told that the original value of the whole quantity was not more than ten or fifteen pounds. The inconvenience, or loss of selling a part to disadvantage there, would have been very trifling; and with this small sacrifice to the obligations of the treaty, he might have gone on with security, and without incurring any of the imputations which have been since charged upon him. Instead of pursuing this prudent conduct, the master is induced to misrepresent the quantity throughout, whatever be the cause of that misrepresentation; and, I think, it must have been so misrepresented, for the purpose of obtaining a clearance to the *Isle of France*, which it could not be supposed that the Governor would have granted, if the whole quantity had been disclosed. Having once so reported, the master was under the necessity of adhering to his first account, until the actual disclosure, and then it was to be said in explanation, that it must be taken to be as a mistake, and that it could not be otherwise.

The second question which arises from this statement of facts is, Whether the seizure was made at a time when the intention of going to the *Isle of France* was sufficiently carried into execution? If there was any original design of going to the *Isle of France*, it is clear that the master had already completed part of the voyage; and that the vessel was actually unmoored in further prosecution of it when the seizure was made. The original pa-

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pers all express a destination to the *Ile of France*, and the fact afterwards turns out to be agreeable to that representation. The coincidence at least is very striking, and affords strong grounds to presume that the original destination was *absolutely* to the *Ile of France*. But supposing that it was only of a shifting nature, and that it was merely eventual. *That* in law would be quite sufficient; and *that* at least must be taken to have been the design of the parties. The Governor supposed it to have been more, and that the vessel came into *St. Helena* only to clear decks, and facilitate her course. It is, however, not necessary to enquire whether this suspicion of the Governor was well founded, or not; because if the intention was no more than this, "I will go and sell pitch and tar at *St. Helena*, if I can, and if I cannot, I will go on with them to the *Ile of France*, and sell them there," *that* is an unlawful purpose; and every step taken in the prosecution of such a design is an unlawful act. The interposition of an *English* port would not make it innocent. Part of the projected scheme had already been executed; a clearance had been obtained, and the vessel was actually unmoored, and in prosecution of the latter part of the purpose, when the hand of the Governor was laid upon her.

The remaining question is, Whether the illegal act, which I am of opinion did sufficiently exist at the time of seizure, has been defeated, or in any degree altered, by any thing which has passed since between the Governor and the claimant? On this point it might be sufficient to observe, that the Governor had no authority for any such purpose; because if the King was entitled to any interest by virtue of this seizure, if his right was once vested, no act of this Gentleman, in the capacity of an officer of the *East India Company's* settlement

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settlement at *St. Helena*, could dispossess the King and defeat his title to confiscation which had already accrued. It may be farther observed also on the fact, that the treaty between the Governor and the Master proceeded on a supposition that every thing relative to the cargo was fairly transacted, and that the quantity of pitch and tar was not more than seven or eight barrels, as represented in the master's declaration. Grounds of dissatisfaction might exist as to the ship, and as to the conduct of the master at the island, but no suspicion had arisen as to the cargo, till the unlivery discovered this concealed quantity of pitch and tar. Upon this disclosure the Governor informed the master that he could not be permitted to go on. He directed the ship and cargo to be seized, and immediately proceeded to take the examinations; and, under the particular circumstances of the case, he acted, in my opinion, wisely, and warrantably in so doing. What the master means by saying, "that he applied to the Governor to know why his ship was seized, but that he could get no answer," I am at a loss to conceive, when this very charge was contained in the Governor's letter, and there appears to have been no denial on the part of the master. A farther negotiation commenced respecting the purchase of the ship, with a lenity on the part of the Governor, which is rather to be deemed excessive; because payment for the rest of the cargo and for the ship would be money thrown away, if the pitch and tar were contraband; inasmuch as the carrying of contraband so concealed would work the forfeiture of the ship and cargo belonging to the same owners. The negotiation however goes off; and the ship is sent to this country for legal adjudication, and upon the legal

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o'clock in the morning had got under way (a), and had been pursuing a course directly from the *Swift* about an hour before the boat of the *Fly* could put off, which was not till nine o'clock, when the flood began to make where she lay. The prize would have effected her escape, before the *Swift* could have been in a situation to render any assistance. There was therefore no act done nor any intention manifested, by which the common foundation of constructive assistance, the prospect of intimidation, or assistance, could be said to be held out to the different parties, so as to entitle the cutter to maintain an interest in the capture.

On the part of the Swift, the King's Advocate and Swabey.—It is admitted that the cutter was in sight at the time of capture. but undoubtedly the presumption arising from that circumstance may be repelled, as it has been frequently held, by a contrary course, and by other circumstances of a positive nature; inasmuch as acts of a positive nature may fairly be taken as a declaration of an intention not to partake or meddle in the seizure. But no such inference can arise from the mere circumstance of being at anchor, more especially in a case like the present, when both the vessels were in the same situation, and were waiting for a wind to enable them to make the capture. In such a situation the *animus capiendi* must be presumed, and the movement of the prize, if it were admitted,

(a) This fact was denied on the other side, but it was admitted that the prize was endeavouring to move a little farther from the rocks, when she was seized.

would

would not vary the case so as to defeat the consequences arising from such an intention. It is said, that the lieutenant had gone on shore, and by that act might be supposed to have abandoned all design of seizing. But taken in conjunction with the moral certainty that existed of the prize not being able to escape the *Swift*, when the tide set in, it was merely an intermediate act, scarcely to be considered as a postponement of the seizure, much less as an abandonment of the design. The purpose of abandonment is also contended to be inferred still more strongly from the commander of the *Swift* continuing on shore till after the tide had turned again. In so doing, it is said, he waived the opportunity of reaching the vessel, if in fact he had ever entertained the intention of sending the boat on board at high water. But it must be recollected, also, that the boat of the *Fly*, which lay nearer, had gone to the prize in the mean time, and that this movement had been perceived by the officer on shore. That circumstance would remove the necessity of proceeding to make an actual seizure, though it could not affect his right, as a constructive captor, to all the benefits usually attending *the being in sight* at the time of seizure.

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DEER.

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JUDGEMENT.

Sir William Scott.—In this case it is certain that the privateer was the actual captor, and also a meritorious captor, as the object was not effected without considerable exertion. It is equally certain, that the King's ship was in sight at the time. On behalf of a King's ship, this circumstance alone is generally held sufficient to found a claim of joint-capture, and to raise a legal

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(a) *Supra*,
La Flore, p. 269.

presumption of the *animus persequendi*, (a) which is not so readily attributed to private ships of war. They go out principally on speculations of interest, and are not called upon to exert those prompt hostilities on every occasion, to which King's ships are in duty bound by the nature of their service. As to King's ships, however, it is undoubtedly true, that the presumption may be repelled by contrary circumstances, tending to shew that there was either no knowledge of the capture that was going on, or no intention to partake in it—in fact, that there was no active or constructive assistance. In one case, the Lords of Appeal decided, that the act of steering a contrary course would have the effect of repelling the force of any inference raised on the mere presumption of law; and other cases might be put, short of that, which would, I conceive, have the same effect; as, if a King's ship was lying in harbour, utterly ignorant of the occurrence, with her men dispersed and sails unset. In the present case, for instance, if no one had been left on board, cognizant of what was going on, it might have been a circumstance that would have justified the application of the same rule. But the facts upon which this claim is founded are very different. Here was a man of war going towards *Guernsey*, as was the privateer also in the same course; they both came to an anchor, being becalmed, but both entertaining the intention of prosecuting their voyage when a breeze should spring up. The Commander of the King's cutter went on shore, but it is proved, that before he went he gave orders, "*that the vessel in sight might be watched, that at a proper time she should be boarded, and a signal should be made to him, if she should weigh anchor,*" It is evident, therefore, that the prize

prize had been an object of attention to the King's ship; and, the master adds, that he kept a watch upon her, and kept his sails hoisted to be in readiness, "*if a resistance had been made to the boat which was perceived to go off to her from the privateer, or if there had been any attempt to escape.*" If there is any truth in this evidence, it is impossible to contend that there was no intention to pursue. The chief circumstance on which any reliance has been placed is, that the commanding officer, Lieutenant *Mounsey*, went on shore, as he says, to reconnoitre the prize, and to perform other services. But, considering that such directions were left, and that the state of the winds insured almost a moral certainty of affording assistance when it should be required, I think much stress is not to be laid on that fact. The privateer did not put herself in motion, but sent her boat with eight men; and it is to be observed, that there were seven men on board the prize, who might probably have resisted, if it had not been deemed hopeless from a view of the assistance which was to be expected from the cutter. The subsequent conduct of the party, also, is not immaterial, as shewing what was the intention of the *Swift*.^(a) As soon as the wind and tide served, both ships got under

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(a) An objection had been taken to the evidence of the mate of the *Swift*, examined under a release, on the ground that he still confessed that he expected to share in the prize. His words were "that the deponent knows that he has by the said release divested himself of all legal claim to any part of the said capture, but that he expects, should the said *W. Mounsey* succeed in this cause, that he will be liberal, and suffer the deponent to receive his share of the said capture." It was answered, that this objection went only to the credit, and not to the competency of

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under weigh to proceed to *Guernsey*, and on the very first meeting Lieutenant *Mounsey* took measures to assert his claim. It is not necessary that the eye of the Captain of the King's ship, who was on shore, should be on the vessel at the precise moment of seizure, though, according to some parts of the evidence, even that circumstance was not wanting: It is sufficient that those on board were left with proper directions, and that they exercised a general attention on the object, with a view to the capture, when a proper opportunity should offer. On the facts of this case, I am of opinion that there are no circumstances shewn, which can have the effect of ousting the claim of the King's ship, founded on the general presumptions of law, and, therefore, I shall pronounce for the interest of the *Swift* to share in this capture.

the witness, and that it had been so held in several cases both in this Court and the Court of Appeal. *Objection over-ruled.* So in the case of the *San Jose*, 5th Feb. 1806.—But note the distinction. In the case of the *Amitie*, *Villeneuve*, 21st Feb. 1806. The King's Advocate objected to the evidence of one witness, that in his answer to the sixth interrogatory, he had acknowledged, "that he cannot say that he is not interested, inasmuch as he conceives he will be entitled to share, if his vessel was pronounced a joint captor, though he had signed a release." On the other side, *Laurence* contended, That as he was clearly not interested, the effect of his impression was no more an objection in this case, than in those in which the expectation depended only on the bounty of the parties. But the Court rejected the evidence, observing, "I have always understood the distinction in these Courts to be, that if the witness says only that he expects to share from the bounty of the captors, he is not *disqualified* or rendered *incompetent*, whatever may be the deduction of credit to which he is exposed.—But if he thinks himself entitled *in law*, he acts under an impression of *interest*, which renders him *incompetent*, however erroneous that opinion may be.

Instance

Instance Court.

Jan. 29th,
1805.

THE THAMES, DRUMMOND.

THIS was a case of collision, on a suit brought by the late master and owner of the coble, or fishing-smack, the *John and Mary*, against the owner of the *Thames* sloop.

Case of Collision,
Damages
and Costs.

The A&C of Court alledged that about ten o'clock in the morning of the 11th of *October* 1803, the said coble was off the port of *Great Yarmouth*, steering about North North East, hauled close to the wind, for the purpose of getting the land on board, with a fresh breeze from the North West by North, at which time the sloop (the *Thames*) was sailing to the southward with the wind free, and drove against the said coble, and struck the same with such violence on her starboard bow, that the said coble soon afterwards sunk, and was totally lost, with all her fishing nets and three lasts of herrings, stores, &c. and that the loss of the said coble was solely occasioned by the misconduct of the crew of the said sloop (a). The
different

(a) On the part of the *Thames*, the circumstances of the accident were stated in the following manner: That the said vessel, the *Thames, Drummond* master, sailed on the 9th of *October* 1803, from *Dundee*, bound to *London*, with a cargo of various goods, and that during the said voyage, to wit, on the 11th of the said month, about ten o'clock A. M. the said ship being then between *Eastness* and *Orfordness*, with all her sails set that would stand,
with

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different representations of the parties were supported by affidavits. As it was a question depending very much

with a fresh breeze of wind from the North West, steering West by West, the said *Francis Drummond* being desirous of learning if there were any *French* privateers on the coast, resolved to speak a fishing-coble, which he perceived at about three miles distance, on his weather bow, standing to the northward, and for that purpose directed the man at the helm of the *Thames* to haul her close to the wind, which was done accordingly. That *Robert Hepburn*, the mate soon after waived his hand to the coble, to speak her; that at such time, and until the accident hereafter mentioned happened, there were but two men on the coble's deck; that thereupon the man who was steering the coble, instead of gradually bearing down and taring the *Thames*, as he might and ought to have done, put his helm hard a weather, in order, as it appeared, to go athwart hawse, and to leeward of the *Thames*, than sailing close by the wind. That the said *Francis Drummond*, conceiving that the coble could scarcely clear the *Thames* in that direction, ordered the man who was steering the *Thames* to put the helm hard a lee, in order to throw her into the wind, and thereby to avoid the coble, which was immediately done, and the coble thereby passed clear of the *Thames* to leeward. It was farther alledged, that if the said coble had continued her then course, she could not have come on board of, or received any injury from the *Thames*, but that *while passing* the *Thames*, as aforesaid, the man who was steering the coble quitted the helm, without any reason for so doing, and ran forwards; that the steering of the coble being thus deserted, she came up in the wind, and having great way through the water she ran under the lee and larboard bow of the *Thames*, and struck her own starboard bow against the larboard bow of the *Thames*, and struck the latter with such violence, that she stove in her own starboard bow. It was farther alledged, that during the whole period of the aforesaid transactions the wind was North West, and not North West and by North, and that if the said coble had been kept in the course she was steering, when first observed by the *Thames*, she would have passed clear of the *Thames* to windward; and that afterwards when the said coble altered her course,

with

much upon technical skill and experience in navigation, at the application of the parties, the assistance of a Trinity Master was requested.

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On this day, Captain *Huddart* attended in compliance with the request of the Court, and the case was argued upon the evidence of the facts relied on in the different affidavits. Captain *Huddart* being then desired by the Court to state the impression which the evidence had made upon him, observed, "That it did appear to him, that the representation given on the part of the *Thames* was not stated in a seaman-like manner; that the *Thames* was described to be sailing to the South, with a wind from the North West by North, whilst the coble was coming in a contrary direction; that it was asserted, on the part of the *Thames* that she wanted to obtain information of the coble, and to take in some herrings from her, but that she did not act in a seaman-like manner for that purpose; that in attempting this object it did not appear that the *Thames* ever altered a sail, though it was not to be expected that the information could be supplied, and the herrings thrown on board, without any notice being given to the coble of what it was that was wanted; that in his opinion the *Thames* should have been put about, by which means all the

with a view to pass the *Thames* to leeward, she would have done so by the *Thames* putting her helm a lee, as she did, and avoided the accident that happened, if the man who was steering her had not, as aforesaid, deserted the helm. That the *Thames* was navigated in a proper and seaman-like manner, and that the aforesaid accident arose entirely from the unskillfulness, mismanagement, and negligence, of the master of the said coble, or of the man who was steering.

danger

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danger would have been avoided ; that it appeared to him that the loss had been occasioned by the bold manoeuvre of attempting to run the *Thames* all at once along-side the coble, which did not appear to have ever altered her course ; that the particular manner in which the blow was stated to have been received on the starboard bow of the coble, from the larboard bow of the *Thames*, could not have happened whilst the vessel was passing, unless owing to the improper course and direction in which the *Thames* was steered. That, upon the whole, it appeared to him that the accident was owing to the unseaman-like manner in which the *Thames* was navigated.

JUDGMENT.

Sir William Scott.—The Court is very much obliged to Captain *Huddart* for these observations. They are such as perfectly concur with the opinion which the Court itself would have formed on a more superficial view of the subject. It was to be expected from a Gentleman of nautical experience that he would be able to form a judgement on more critical grounds, and that expectation has not been disappointed. Under these observations it remains only for the Court to pronounce, That the coble was run down and sunk by the misconduct of the *Thames*, and that the loss which has been so occasioned, must be repaired.
—Costs given.

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STELLA DEL NORTE, COSTA.

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THIS was a case on the admission of an allegation of joint capture, on the part of the fleet under the command of Lord *Keith*, claiming to share in certain vessels taken by ships detached from that squadron to act in concert with the *Austrian* forces on the coast of *Genoa*, for the purpose of driving the *French* forces out of that Country. The ship in question and several other vessels were captured by his Majesty's ships the *Phaeton*, *Mutine*, and *Camelion*, coasting along shore, in co-operation with the *Austrian* forces, after the *Austrians* had driven away the garrison from a battery, under the protection of which these vessels had been lying.

Conjunct Expedition.
Claim of Joint Capture, on the part of ships detached from the capturing squadron, alleged by virtue of the special nature of the service, and the agreements between the *Austrian* General and Lord *Keith* not sustained.

On the part of the claimants, It was contended, That this case was distinguished from ordinary cases of captures made by detached ships out of sight of the squadron, by the circumstance of the associated service on which the vessels were employed, and by the agreement between Lord *Keith* and the commander of the *Austrian* forces, "that all *booty* made on that expedition should be divided equally between the *British* and the *Austrian* forces."

On the other side, It was denied that there was any thing in the nature of the service to raise a distinction between this case and other captures by a detached

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detached force.—That it was too much to attribute such an effect to the vague terms of the agreement alluded to; more especially as that instrument was not before the Court. The general argument being comprized in the observations occurring in the judgment, it is deemed unnecessary to insert it in detail in a case of this description.

JUDGMENT.

Sir William Scott.—This question arises on a capture which is stated in the allegation to have been made in a *conjunct expedition*, but certainly in an expedition, very much distinguished from those which are usually so denominated, and differing in two circumstances from the cases of *conjunct expedition*, which are described in the Prize Act. The first of these circumstances is, that it was a *conjunct expedition* between his Majesty's sea forces, and an Allied Army, which is alone sufficient to take it out of the operation of the Prize Act, which must be supposed to regard only such expeditions, as are undertaken by his Majesty's land and sea forces. A second material circumstance is, that the provisions of the Prize Act point particularly to expeditions, against some fortress at land, which is accessible by land on one side, and by sea on the other, against which, both descriptions of force are capable of concurring in one identical operation. This is a case totally different; inasmuch as it is a capture entirely naval, for which, as a case of *conjunct operation*, the Prize Act does not provide any rule, and for which I am not aware that any authority can be derived from precedents that have occurred

occurred in the practice of this Court. As far as the particulars of the case may be taken to be distinctly stated in the allegation, it is a conjunct expedition of a much wider range; it is the case of an army sweeping the shore, and of a fleet sailing along the coast, not pressing on any particular point, but both going on progressively, with a view of affording mutual assistance against a whole Country. It is therefore materially different from ordinary cases in this particular circumstance, that it is not easy to conceive objects of booty or prize, as to which there could be any privity or co-operation between them. Suppose the case of a *Russian* army landed in *France*, and supported, as far as it was capable of receiving assistance, by an *English* fleet upon the coast? Though a general purpose of concert and assistance might subsist between them, there would be many acts and many situations, in which there could be no possibility of co-operation. If the army moved ever so little into the interior with a view of concentrating its force, or of taking a more advantageous position, any booty taken in such a course would be a capture, towards which scarcely any privity, or communication of endeavour, could subsist between the two forces, in comparison with other cases of co-operation, pointing to one particular and identical object. So on the other side, whilst the army was ever so little retired, a capture made by the fleet of any ships appearing on the coast, must be an act in which the army could have very little participation. I mention these instances for the purpose of shewing that the present case, in its full extent, is rather of a novel nature, and not falling within the rules of conjunct

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junct expeditions, as they are ordinarily applied in this Court. It would at least require some consideration, therefore, before the Court could venture to determine how far the provisions of the Prize Act are to be applied, in all points, and without reserve, to govern such a case. It is rather a case to be settled by compact between the parties;—in which it would be extremely desirable that unanimity should be secured, and all cause of dissension effectually removed by previous understanding and agreement; since I am not aware of any principle of law, or of any authority from practice, by which the interests of the several parties have been hitherto ascertained. These are some considerations which arise on the general view of the case, and I advert to them for the purpose of intimating how necessary it would be for the Court, when it is got on such new ground, to have the facts of the case established with all possible precision, in order that it may be enabled to see more distinctly what that ground is. It does not appear to me that the facts are sufficiently described in this allegation. No mention is made of the agreement, on which the whole cause depends, till the eighth article, and merely in terms of reference as to a past transaction:—"That it had been agreed by General *Melas*, and Lord *Keith*, by correspondence, that all booty should be divided between them." At what time this correspondence passed, or what were the exact terms of the agreement, we are not informed. It is certainly very desirable that the agreement itself should be produced, that the Court may be enabled to put its own legal construction upon it. It is only
stated

stated generally, "that there had been such an agreement," and in these large terms—"that the whole booty should be divided." In such an expedition as this was, entirely out of the view or contemplation of the Act of Parliament, the Commanders in Chief of the several parts of the combined forces may, I think, be supposed with great propriety to be invested with sufficient authority to make such an agreement, as a necessary measure for preserving the harmony of the expedition; and if that agreement was confirmed by their respective Governments, it is that which this Court would consider as competent to bind all the parts of that force. It would be necessary, however, before any advantage could be derived from the stipulations of that agreement, that the agreement itself should be very distinctly before the Court.

The allegation states, "that the ships took possession, &c." That the army was in any way instrumental in this act does not appear, though something of that kind has been thrown out in argument. The allegation goes on to state what I conceive was meant to be a ground of law on which the other parts of this fleet would be entitled—since this is not a proceeding on the part of the army—"That they were under the command of Lord Keith." Certainly that alone would not be sufficient, that they were under the same command, if employed on separate services. It is stated also, "that they were employed in the blockade of Genoa, and in co-operating with the Austrian forces under the command of General Melas." Now, on the whole of this description, I think it would be going farther than the authority of any case yet determined would warrant, to hold, that all these points of co-operation are to be combined in such an unity of purpose, as to entitle all the parts of

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that force to share in each other's booty. One part was employed in the blockade of *Genoa*, a second detachment was employed upon the coast on one side of *Genoa*, and another on the other side. To say that all these services are to be combined in one general co-operation, would be to establish a principle of unity in conjunct operations, of a very large scale, and far beyond what the Court is warranted to do by the authority of any case that has yet been determined. It is said, "that the *Austrian* forces were instrumental in driving away the garrison from the forts by which the ships had been protected, and that the capture could not have been made by the *English* ships alone, without the operation of the *Austrian* army." That I think would not be decisive to support an interest. In the case of a *Russian* army, which I have already suggested, the movements of the army, though without reference to that effect, might tend eventually to the success of an attack of ships on the coasts, though the movements were taken only for the accommodation of their own plans; yet, on such a remote and accidental assistance, it would, I think, be difficult to construct a claim of joint interest, on the principle of co-operation and conjunct expedition.

There are two ways in which this case may be considered,—first, without any reference to the *Austrian* army; and secondly, with reference to that connection, and the effect of their co-operation. If the case is considered independent of any connection with the army, and only under the ordinary grounds of capture at sea, it appears to me that the fleet at large could not establish a right to share, though Lord *Keith*, I perceive, seems to have entertained a different impression. On the other sup-

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position, that the event *was* materially connected with the operation of the *Austrian* forces, the effect of that circumstance must depend almost entirely on the terms of the agreement; and I have already observed, that the article pleading the agreement, is not very *distinct* or specific in the description of it. As it stands at present, it states that “the *whole booty should be divided*.” The word *booty*, is in itself rather an equivocal term, and in its obvious meaning applies more properly to capture at land, and to the capitulation of towns; without some context, to qualify its general sense, it would not, I think, be taken in its ordinary meaning to point to captures at sea, though Lord *Keith*, very honourably towards the *Austrian* army, seems to put that interpretation upon it. Another expression is, “*that all articles which came into their hands should be divided*.” That again, is not a very precise phrase; and it is always to be remembered that the *Austrian* forces do not seem to have put that construction upon it, since they are not before the Court in any manner asserting a claim on their own behalf, as arising out of this agreement. They are silent on the subject; and by their silence, they must be considered as disclaiming any interest in the captures, and as admitting that they did not understand the contract to apply to captures of this nature. In argument, indeed, it has been attempted to account for their *non appearance*; but that is the suggestion of Counsel only, whilst on the other hand there is the fact itself, *that they do not appear* to put forward any claims on their own behalf. This non-appearance must, I think, be taken as a waiver or disclaimer of any such interests. I must observe, also, that it is not shewn in what

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manner the agreement was acted upon in other respects: Whether in fact it was adhered to, or *renounced* by the principal parties themselves? Suppose a contract between two persons, A. and B! If it was renounced on the part of B. I do not see that it would be competent to other particular persons under A. that is, in the present instance, under Lord *Keith*, to set up the instrument, and demand to have a different principle of distribution applied towards *them*, and with reference only to other subordinate parties under it, than what would have prevailed, if no agreement had been entered into between the principals, or had been cancelled or become extinct, or had been formally renounced. What the result might be of a demand on the part of the *Austrian* army; it will be unnecessary in the present instance to consider, because there is no intimation of a claim on their behalf. They are silent; and this silence must be taken as a virtual renunciation of every demand on their part. That being the case, I am of opinion that it is not competent to these other persons, composing the fleet under Lord *Keith*, to set up the agreement, or the effect that might attend it, if directly brought forward and substantiated, on behalf of the original parties themselves. I am disposed, therefore, to reject the allegation, as insufficient in point of law to support the interest claimed under it.—Expences allowed by consent.

DIE FIRE DAMER, GIESE.

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THIS was a case of a claim of costs and damages, on account of injury sustained by striking on a rock off *Falmouth*, owing to the wilful neglect of the prize-master in refusing to receive advice or take a pilot on board. The protest of the neutral master stated a case of great violence on the part of the prize-master, who was represented to have been in almost a continued state of intoxication, and to have been guilty of great cruelty and misbehaviour to the crew of the captured vessel. Farther time had been repeatedly given to the owners to defend themselves against this charge. No affidavits being now produced——

Damage by wilful negligence of the prize master, compensation.

On the part of the claimant, *Laurence and Robinson* stated the damage which had been sustained, and the ill treatment of the crew, and prayed, that the Court would mark this case by decree of pecuniary compensation against the owners in the same manner as was done in the case of the *Purissima Concepcion*. (a) Supra, p. 33.

JUDGMENT.

(a) The Editor takes this opportunity of introducing the sequel of that case: On the 9th of *April* 1805, it came on again, on the report of the Registrar and Merchants, stating the amount of the embezzlement which had taken place, &c. On the part of the *British* Merchant who had acted as Agent in claiming the property, it was prayed that the Court would confirm the Report,

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Sir William Scott.—I am under the necessity of holding this charge to have been sufficiently proved by the oath of the neutral master, unanswered as it is

notwithstanding the *Spanish* proprietors were now become enemies, and had no longer a *persona standi* before the Court: That it would direct the sum reported to be brought into the Registry, and also the Costs, for the purpose of being paid to the *British Merchant*, as an indemnification for the expences incurred by him in prosecuting the claim. *The King's Advocates* stated some circumstances in mitigation, on the part of the captors. — *Court.*—This was a case of great misconduct in the privateer, who made the seizure in time of peace, and afterwards delayed for a considerable time to bring the case to adjudication. When it was brought on, restitution was resisted on grounds which the Court could not but consider as wholly untenable. At the time of the former decree, the charge of embezzlement was referred to the Registrar and Merchants, and the question of costs was reserved. The Registrar and Merchants now report that there is a deficiency. To the former decree I look back without any dissatisfaction, considering it to be nothing more than what was due to the parties, and to the honour of the country. I am, therefore, disposed to carry that decree into effect to the utmost extent, unless I am obstructed by any principle of law that should prevent me from making any decree in favour of persons, who now stand in the condition of alien enemies. But I think I can perceive a mode in which I shall avoid all danger of violating any principle of law, and in which I may expect to be supported by the authority of Government. I shall direct the money to be brought into the Registry to be at the disposal of his Majesty; and I apprehend it will not be difficult to obtain a licence to enable the claimants to take it out, as a reparation for the injury which the Court has already pronounced them to have received. I shall direct the sum reported as deficient, and also the costs, to be brought into Court.

by

by any evidence offered on the part of the owners of the privateer since the cause first came on in *September 1803*. That damage was actually sustained is indeed admitted by the negotiation which the agents of the owners are stated to have been at one time disposed to enter into, for the reparation of the injury which the vessel had received. It must, therefore, be pronounced to be a case of costs and damages, and be referred to the Registrar and merchants to report the amount. But the Court will not stop here: Owners are farther answerable for the proper conduct of the persons to whose care they entrust the conduct of their privateer. They ought not to put their vessel into the hands of a person capable of being guilty of such outrageous behaviour, as is imputed to the prize-master in this instance, and is not contradicted. The protest was communicated to the owners in an early stage of the cause, and it was their duty immediately to have used all means to exculpate themselves and their crew (*a*). Since this has not been done, I must admit the charge as proved; and I think I deal out very scanty justice, by condemning them in the sum of one hundred guineas, to be divided amongst the crew of the neutral vessel, which consisted of ten persons. As to the distribution of that sum, I shall direct twenty guineas to be given to the master, fifteen to the boy who was particularly the object of ill usage, and the remainder to be divided equally among

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(*a*) It was said in excuse that the prize-master and other persons, on whose affidavits alone they could ground any defence, had been absent ever since on a voyage to the *West Indies*.

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the rest of the crew. It is stated, that the privateer which made this capture has been since lost. If that had not been the case, I should certainly have directed measures to be taken for the forfeiture of her letter of marque.

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THE SACRA FAMILIA, GUSAP.

Decree of removal, on the prayer of the actual captor, sustained, notwithstanding the opposition of an asserted joint captor.

THIS was a question arising on an application made on behalf of a *Liverpool* privateer, being the actual captor, to have the prize removed to *Liverpool* from *Plymouth*, where she had been brought by a King's ship, who had dispossessed the privateer, under the pretence of being a joint-captor. A decree had been obtained to that effect on a former day, but a motion was now made on the part of his Majesty's ship the *Uranie*, the asserted joint-captor (a), praying that the Court would not permit the commission to issue.

On the part of the joint-captor, the King's Advocate.
—The capture was made soon after the declaration of hostilities against *Spain*: The privateer, who was the actual captor, had not a letter of marque on board against *Spain*. The *Uranie* being in sight at the time, and coming up, took possession of the prize, under an erroneous impression, which seems to have been very generally entertained by the navy, and which

(a) 11th June 1806.—This cause came on to be heard on the claim of his Majesty's ship *Uranie*, to share as joint captor, on the plea of *being in sight*, when the claim was established.

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is stated to have arisen from a misapprehension of the law to that effect, circulated in a late publication (a). It does not appear that the master of the privateer in any manner opposed the measures which were pursued on the part of the joint-captor, or that he expressed any intention or wish to have the prize sent to *Liverpool*. To remove her to that port would be rather for the convenience of the owners, than for the benefit of the joint-interest, in which the King's ship, though only a joint-captor, will partake to a much greater extent than the privateer. Under these circumstances, and after an allegation of joint capture has been asserted, it is hoped that the Court will not sanction a measure which will take the prize entirely out of the view of the King's ship, or if it is thought necessary to remove her at all, that the Court will direct the prize to be brought to *London*.

On the other side, Laurence stated—That the commission had been already granted; and submitted, with reference to the circumstances of the case, that sufficient cause was not shewn why that decree should be superseded.

(a) "If the State be at war with different States, it is necessary that there should be either one commission including all, or separate commissions against each; otherwise, if a captain, having a commission only against the *French*, should fall in with and capture a *Spaniard*, such capture could not be condemned in the Admiralty as lawful prize, *but might be taken away by such man of war as should first fall in with him.*"—*Spirit of Marine Law*, by John Maxwell, of the Honourable Society of the Inner Temple, and late of the Royal Navy.—This citation is introduced, solely for the purpose of correcting the erroneous intimation of the last clause, by the observations made upon it in the Judgment; *infra*, p. 362.

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JUDGMENT.

Sir W. Scott.—The question before me is, Whether I shall carry into effect the decree which has already passed, or whether sufficient cause is shewn to stop the commission which has been granted? It appears that the prize was a *Spanish* vessel of considerable value, taken by a *Liverpool* privateer, not having on board a letter of marque against *Spain*; but the master must be presumed to have supposed that his owners would be active in their own interests, and that they would use immediate exertions to arm themselves with a commission against *Spain*. He made the capture expressly on the ground of *Spanish* hostilities, and had in his possession the Gazette containing intelligence of that occurrence, and shewed it to the master of the *Spanish* vessel. The King's ship came up after the capture, and dispossessed him. I am not disposed to say any thing vindictive on this point, as the error seems to have been very general in the navy, and to have been derived from some publication, which the Gentlemen of that profession have been in the habit of considering as legal authority. The fact however is, that the King's ship did dispossess the privateer, and brought the prize to *Plymouth*, where, on better advice being obtained, the possession was, it is said, immediately given up. Proceedings were commenced here on the part of the privateer, no appearance being then given for other parties. A commission of removal was prayed, and was not then opposed: Under such circumstances it was not necessary for the actual captor to do more than state his wish that the prize might be removed to *Liverpool*; the commission passed,

ed, as of course, under the usual provisions. That the parties should wish the prize to be carried to their own port was very natural; and as long as it was not an improper *market*, which *Liverpool* can scarcely be stated to be, there seemed to be no ground of objection on the part of the Court. Had the application been for a removal to a market evidently disadvantageous, as for instance, to *Greenock*, or any other such port, where the convenience of the actual captor would have been consulted in opposition to the *general interest*, the case would have stood on very different grounds. An opposition is now given on the part of the joint captor, praying that the prize may not be removed to *Liverpool*, but that it may be brought to *London*. To sell at *Plymouth* is out of the question; that port cannot be supposed to afford a very beneficial market. It seems indeed to be entirely out of the intention of either of the parties that the prize should remain there; but they are not agreed as to the place to which she shall be removed. Now, in such a case, I have always understood that the actual captor is *potior jure*. Can it be said that, when he is desirous of sending the prize to a port not improper, and more commodious for the convenience of the owners, a mere constructive captor should be at liberty to defeat that wish, by suggesting a market, which may by possibility be in some respects a little more advantageous. To allow such a power to the *constructive captor* would be going farther than I ever remember to have been done. If the port to which the prize was intended *to be removed*, had been a port unsuitable in itself, or one in which any danger of embezi-

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embezzlement could be apprehended, I have already said that it might afford grounds for an opposition of this kind. In the present case, the only question which could be made, is, Whether the privateer expressed any intention of sending the prize to *Liverpool* in the first instance, or whether it might not have been brought to *Plymouth* with the perfect concurrence of all parties, and whether the actual captor shall be called upon to shew an original intention of going to *Liverpool*? Because, if no such wish was entertained at the time of capture, and the intention of carrying her to *Liverpool* was only lately taken up, in departure from the original plan, it might perhaps justify a joint captor to oppose such a removal. But on this point I think it must be presumed from the situation of the parties and the circumstances of the case, that such an intention was in fact entertained on the part of the actual captor; or if any doubt can be supposed to exist on that head, it is again repelled by the neglect of the joint-captor in not appearing to make any objection to the original application.—I am of opinion that the objection, coming as it does at this late period, is not sufficient to induce the Court to supersede the commission which has already been decreed, and I have no hesitation in directing the former decree to be carried into effect.

THE MARIA, JACKSON.

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THIS was a case of an *American* ship which had come from the *Havannab* to *New Providence*, with a cargo of colonial produce, and was proceeding, when taken, with a considerable part of that cargo on board, to the port of *Amsterdam*.

Continuous voyage in the colonial trade of the enemy: Review of former cases. Farther proof on the facts of this case.—*Ultimate Requisition.*

On the part of the captor, the King's Advocate and Laurence adverted to the general principle of law that had been applied to this class of cases; and to the necessity of adhering to it, in proportion as the activity employed in this course of trade on the part of merchants in *America*, and the interests which the enemy (a) had derived in encouraging such a trade, became

(a) The interest which the Enemy sometimes confess themselves to derive from the assistance of foreign merchants, protecting by fraudulent devices the commerce between the mother country and their colonies, may be estimated by the following extracts from letters found amongst the papers of the *Orion*, 13th March 1806, and written by persons at *Amsterdam* to their correspondents at the *Cape of Good Hope*.—"How much it grieves us not to have it in our power to execute the accumulated orders of all our friends, owing to the vexatious situation of the times.—The only channel we had, to wit, through *Copenhagen*, which we could avail ourselves of last year, we are now also debarred from, owing to a strict interdiction of the *Danish* Government not to load any other goods than those which are *bona fide Danish* property, which has prevented our friends as well as all other houses of repute to be of service to us therein as formerly. We are not ignorant that there are expeditions made to your remote quarter of the globe, and still farther from other neutral places, but we do not consider ourselves justified, without special authority from our employers, to risk their property in this manner.

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came every day more manifest.—On the facts it was contended, that the course of the transaction afforded sufficient grounds to establish the original intention. The vessel had come from the *Havannab* to the port of *America* on the 31st *May*, and proceeded again, after some necessary repairs, on the 20th *July*, with much the larger (*b*) part of the same cargo on board to the country of the enemy; that the illegality of the trade attached upon the vessel also, as well as upon the cargo; that it had been so held in the case of the *Essex, Orne*.

On the part of the Claimant, Swabey and Adams contended—That there were circumstances that pointed to a severance of intention between the present

In the first instance considering the enormous charges, but principally because we are not sufficiently convinced of the solidity and property of the parties concerned. The same reasons prevent us from participating in expeditions by *American* ships; experience has taught us that these are often marred before their departure from hence, and those upon whose honour we might confide, *hesitate to engage in neutralizing, either from a too rigid principle of conscience, or from self-interested motives.*”—In the same collection of papers is to be found also the following extract of a letter *relative to transshipments in America*, dated *Amsterdam, 24th August 1805*, from Messrs. *Teyffett and Co.* to Mr. *G. E. Overbeck*, at the *Cape of Good Hope*: “Several neutrals have been carried into *England*, and the cargoes condemned on the slightest suspicion, notwithstanding the cargoes had been transhipped in *America*, and had paid the inward and outward duty, which might be the means of exposing our Indian and Cape Friends to great Losses.”

In a late popular publication in *America*, under the signature of *Phocion*, the amount of colonial produce, re-exported by means of drawbacks from *America* to *Europe*, as ascertained by official reports for the last year, is stated to have been 28 millions of dollars; being in proportion of 28 to 75, (*viz. seventy-five millions of dollars*), the amount of the whole imports of the country, according to the same official returns.

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voyage and the voyage from the *Havannah* : that some coffee, which had composed part of the former cargo, had been left in *America*, whilst other parts of the present cargo were taken on freight, and were not exposed to the objection of having been brought from the colony of the enemy ; that as to such parts, the ship could not in any manner be said to have been engaged in an illegal voyage ; that it did not indeed follow that there must necessarily be a unity of purpose as to the voyage of the ship, even if the owner should be held to have formed such an original intention, as to the cargo ; since instances frequently occurred in which the design as to the cargo was carried into execution by means of transshipment, even between vessels of the same owner. In the cases which had occurred lately, there were particular circumstances which led to a conclusion as to the unity of each particular voyage : but the present case does not afford any conclusive evidence as to the cargo, and much less as to the ship ; it was one therefore which the Court would think fit to be referred for farther information.

JUDGMENT.

Sir William Scott.—This question arises as to a vessel which had gone to the *Havannah*, and from thence to *New Providence*, where she was refitted, and took on board part of the same cargo, with other goods belonging to the same owner, and some other articles on freight, and was at the time of capture proceeding to *Amsterdam*. On these facts two questions have been made—First, Whether the goods so going are not liable to condemnation ? and secondly, Whether the ship, as concerned in the same illegal transaction, is not subject

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to the same penalty. It is certainly true that a continued voyage from the colony of the enemy to the Mother Country, or to any other ports but those of the Country to which the vessel belongs, will subject the cargo to confiscation ; and the only point which the Court has to decide is, whether the voyage in question is to be considered as a continued voyage or not. It is a question in its nature subject to very considerable difficulties in particular cases ; and one, on which the Court must exercise its judgment with great caution on the special circumstances which compose the substance of each case, and with great care not to attribute more weight to any particular fact than what it justly demands. In the case of the *Effex, Orne*, which was decided by the Court of Appeal, the principle of law, by which such cases are to be decided, was distinctly affirmed. It certainly is not a novel principle ; and I cannot but express my surprise, that it should be represented in any place, as I understand it has been, that the principle is new. On the contrary, it is an inherent and settled principle in all cases in which the same question can have come under discussion, that the mere *touching* at any port without importing the cargo into the common stock of the country, will not alter the nature of the voyage, which continues the same in all respects, and must be considered as a voyage to the country, to which the vessel is actually going for the purpose of delivering her cargo at the ultimate port. The *Effex, Orne*, was in fact the first case which called for the direct decision of the Superior Court ; but the same doctrine would have been held in any other case, if such a case had occurred at an earlier period ; and cases had

occurred before, very sufficient to convey a full admonition upon the subject. As the *Essex*, however, happened to be the leading case on this subject, it may not be improper that I should state what I conceive to be the substance of it. It was the case of an *American* vessel which had gone from *America* to *Lisbon*, where finding the market bad she went on to *Barcelona*, and there took on board a cargo of *Spanish* produce for the *Havannah*, under the direction of the agent in *Europe*, "that she should go to the *Havannah*, first touching at *Salem*, in *America*, where the owner (a) resided, who adopted the plan, and sent the vessel on." It appeared clearly to the Court, that it was the intention, originating in the mind of an authorized agent, acting under full powers, that the vessel should go to the *Havannah*, and that this purpose was adopted by the owner; that it was in reality a continued voyage from *Spain* to the *Havannah*; that as to the intention, all doubt was done away by the adoption on the part of the owner, who had the vessel in his own port, and was fully implicated in the engagement of sending her on, according to the projected voyage. That was the fundamental case—a case of a trade from the Mother Country to the Colony, with full knowledge of the circumstances, and a distinct adoption of the purpose on the part of the owner. Other cases have occurred since in this Court, which have been determined on their own particular circumstances; as, indeed, all cases of this kind must be entertained on their own evidence, which may be slighter

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(a) The claim was given by the Master for the ship and cargo, as the property of *William Orne*, of *Salem*.

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(*) Adm.
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(b) Adm.
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(c) Adm.
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or stronger, according to the manner in which the transaction has been conducted. The first case that called for the decision of this Court, was that of the *Enoch*, (a) in which appeared one fact, which was in itself conclusive of the intention, viz. a charter-party, providing "*for a voyage to the colony of the enemy, and back to America, and from thence to the Mother Country in Europe,*" affording a compleat demonstration of one entire voyage. It was not merely a circumstance, it was an absolute and conclusive fact, declaratory of the intention of sending on the cargo to *Europe*. The next case was the *Rowena*, (b) which happened on the same day, and which the Court did not distinguish in judgment from the preceding case, though there was this difference between them, that it had not a charter-party linking together the two parts of the original voyage. But other circumstances occurred leading to the same conclusion, and the Court can only decide on circumstances. There were the former habits of the vessel, from which it appeared that she had been for a considerable number of voyages employed in the same course of trade in the hands of the same owner: The whole cargo had come from the colony of the enemy, and had laid in *America* only a *very short* time, just long enough for the purpose of being landed and re-shipped. Under these circumstances the Court thought itself bound to presume that the original intention of sending the cargo to *Europe* had actuated the whole adventure. Soon after came the case of the *Respect*, (c) in which it was affirmed in the claim, that the goods which composed part only of a former cargo, were intended for sale in *America*. This averment was
solemnly

solemnly interposed on oath, and as the matter was dubious, the Court thought proper to admit the parties to establish their averment in proof. These are the principal cases which have occurred in this Court, without advertng to cases that have occurred in the Superior Court; and I now have to consider whether there was in those cases any thing, on which the Court relied, which binds me to conclude, that the present voyage was a continued voyage, and that there could have been no real *bona fide* importation. There are no letters or writings, as in the *Essex*, *Orne*, purporting an original intention to send on: There is no charter-party as in the *Enoch*: There are no instructions, disclosing a course of similar voyages to *Amsterdam*, as in the *Rewena*. The former voyages are clear of suspicion; and I think there is something in that fact, and that it is but just that the presumption from former habits, which weighs unfavourably in some cases, should have its due weight on the other side. It is, indeed, the very purpose of the seventh interrogatory, to illustrate what is obscure in the transaction immediately before the Court by former habits. The present case is distinguishable also in another point of view, that the destination is not to the Mother Country of the colony. I do not say that the rule of law would be different on that account, but as evidence of intention, it is *something*; when the *portus ad quem* is not a port of the country to which the colony belongs, and is itself a place of great general trade, there is not the same preponderance of evidence, the proof of intention is slighter, I will not say how much slighter, but it is a circumstance to be taken into consideration in forming a judgment on the whole.

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case. It is *something* also, that the goods are not the whole of the former cargo; since the inference of original intention is not so strong as to goods which compose a part only, though a large part of a miscellaneous cargo, picked up in different places, and belonging to different proprietors. On these grounds it does appear to me that the present case is substantially distinguished from other cases, determined by the Lords of Appeal, or in this Court, and that it has not the same proof to be collected from circumstances, on which a judicial mind is bound to acquiesce. There is room to let in the supposition that there might be an intention of selling in *America*, and that in consequence of the failure of that prospect only, the design was taken up of sending on these goods to the *European* market. Without abandoning the principle, or being in the least disposed to let it out to a degree of laxity, which may endanger the stability and consistency of the general rule, I think that the claimant may in this case be admitted to prove the averment of an intention of selling in *America*, which is not shewn to be incredible, or inconsistent with any circumstance which is at present in evidence before me. As to the other parts of the cargo, on which no question is raised, they must be restored. The question as to the ship will stand over to wait the judgment, which the Court may ultimately form on the real intention of the owner as to the cargo.

On the 22d of *April* 1806, This cause came on again upon farther proof; when it was admitted on the part of the captor, that the proofs were sufficient, and the Court decreed restitution.

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THIS was the case of a ship under *American* colours, with a cargo of logwood, and about 13,000 dollars on board, bound from the *Spanish* main to *New Orleans*, and captured by the *Minerva* privateer near the mouth of the *River Mississippi*. A claim was given under the direction of the *American* Ambassador for the ship and cargo, "as taken within the territory of the United States, at the distance of a mile and a half from the western shore of the principal entrance of the *Mississippi*, and within view of a post protected by a gun, and where is stationed an officer of the United States."

Claim of territory, established. Restitution, with costs and damages.

On the part of the Captors, Arnold and Robinson.—The claim of territory, which has been asserted in this case, involves several questions of fact and of law: First, as to the place of capture; secondly, as to the nature of the neighbouring ground—whether it is such as can support a claim of territory; and thirdly, a question as to the time from which the capture is to be dated, whether from the time of actual seizure, or from the first summons, and commencement of the chase. As to all these points the evidence is very contradictory. The place of capture is described by the master in his depositions to have been "about two *English* miles from land, at the mouth of the *Mississippi*." The second witness says, "close to the bar of the *Mississippi* very near the shore;" and the third

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witness

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witness says, "near the buoy at the mouth of the River of *New Orleans*." The description which the commander of the privateer gives in his affidavit is, that "about five P. M. 14th *July*, he discovered the *Anna* at the distance of about nine miles, steering north west and by north; that he immediately gave chase, and about half past six the *Anna* altered her course; that about three quarters past six he ordered a gun to be fired; that no notice being taken he ordered another, when finding that the *Anna*, instead of taking notice, hoisted her stay-sail to favour her escape, he fired round and grape shot till she brought to; that the *Anna* was not within neutral territory, but two miles and a half from the bar of the river, and five miles from *Fort Balise*, which is a small fort erected on made land, and is surrounded by water for many miles which never ebbs dry." The representation which the master of the captured ship gives is, "that the place where she was first fired upon, is not more than two miles and a half off the shore, and the place where the ship was anchored when taken, not more than one mile and a half, and both he apprehends and believes within the territory and jurisdiction of the *United States*; that the spots marked in the plan or chart, as between the *Balise* or beacon and his ship, are small islands, which are always dry, and covered with reeds and small shrubs, where people go, and that he had been many times, to shoot wild fowl and procure eggs, which are there found in great abundance; that the intervening parts are shallow water, in part filled up with timber which drifts down the river; that the *Balise* was, during the time of the possession of the *Spaniards*, a fort, with small houses or cabins round the same, where cannon were mounted,

ed, and where a Governor resided, with his wife and family, as also pilots for the navigation of the River, and officers of the Customs, who used to visit all vessels at their entrance." Upon this statement it appears that the most favourable representation of their own witnesses places the situation of the vessel at the time of the first pursuit, but just within the bounds usually ascribed to the extension of territory, at two miles and a half, or scarcely less than three miles from the nearest coasts and shores. The laws of the *United States* on this question are laid down with exact precision, and direct (a) "that their district Courts should take cognizance of complaints by whomsoever instituted in cases of captures made within the waters of the *United States*, or within a marine league of the coasts and shore thereof." Considering that claims of territory are claims of exception to the general rule of capture, and that they are required to be satisfactorily proved, it might be doubted whether, if there was no other point in dispute, the claimants had so clearly brought their case within the territory of the *United States*, as to induce the Court to supersede the ordinary rights of war, and decree immediate restitution, as on a claim of this peremptory nature. This argument proceeds on a supposition that the time of capture is to be dated from the time of pursuit, and that the immunity of territory is not violated by the capture of a vessel which has been chased into territory, in the same manner as when the vessel is avowedly lying in a state of protection in the first instance, and does

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(a) Act of Congress, 4th June 1794.

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not merely fly to it as a place of refuge, from the operations of the enemy. *The fact* is established by the evidence. The law on this point, it is apprehended, is settled in the practice of this Court, and it is discussed at length by *Bynkershoek* with this result, “*Uno verbo, territorium communis amici valet ad prohibendam vim quæ ibi inchoatur, non valet ad inhibendam, quæ extra territorium inchoata, dum fervet opus, in ipso territorio continuatur.*” Qu. Jur. Pub. page 66.—But, as to the nature of the place, is the spot within any measurable distance of what can properly be called coasts and shores? It was not far from the bar of the River, but that is nothing more than a figurative description which has been given to a collection of sand, which may affect the approach of vessels at certain times, but has no necessary connection natural or artificial with the bounds of territory. That it was not far from the buoys at the mouth of the River is also immaterial, as such rights or rather duties of conservancy over neighbouring waters may in many instances prevail, without affording any marks of a territorial jurisdiction. [3 Adm. Rep. page 348.] From what spot then is it that the distance is to be computed?—Not from the fort of the Balise, because that fort was above five miles from the place of actual capture. There is no line of coast from which the computation can be made to fall within the proper compass. The claimants resort therefore to these islands, as they are called on one side, or temporary deposits of logs and drift, as they are represented on the other, that are brought down by the stream of that great River. Can the Court recognize, in spots of such an equivocal nature, under the most favourable description, the ordinary qualities

qualities of territory? It is to be expected, that the outlines of territory should be fixed and *permanent*, and that they should form a visible part of the country to which they are ascribed; it is necessary that they should have this conspicuous permanent character, that neutrals may be affected with the obligation of observing them; and since the distance is reckoned according to the efficacy of protection, that is, within the reach of fire-arms, it might be natural to expect, that the land from which the extension is reckoned, should be a place from which this protection can be afforded. The spots in question possess none of these ordinary requisites of territory. In a case not entirely dissimilar to the present, the Courts of *America* have adhered to the sound interpretation of considering the coasts and shores of the country to be the visible and continuous boundaries of land, by deciding against the doctrine of extending territory over the shoals and shallows on their coast, which are scarcely less entitled to be considered as the continuation of territory, than the spots which are now resorted to for the support of this claim (a). They are not in occu-

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(a) A reference was made in this part of the argument to the case of the *Africaine*, which had appeared in some of the *American* public prints, as decided in the Court of Admiralty at *Charlestown* against the pretensions of the commercial agent of *France*, who had claimed the protection of territory for a capture made by a *British* privateer the *Garland*, of a *French* corvette, 'lying six miles from the shore, at the south end of *Sullivan Island* at anchor off the bar.' It was in that case contended in argument, that the term Coasts included all the shoals to a certain distance; that all Geographers and Surveyors of Sea Coasts understood by Coasts the shoals along the land; that in *Florida* these shoals extended to the distance of twenty miles from the land,

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pancy for any purposes of habitation; they are not at all times distinguishable, and when most prominent, have so little title to respect as territory, that they afford no hope of protection, not even a firm footing to any person who might have occasion to ap-

land, and were within the territorial jurisdiction; that the shoals of the bar are in fact a sunken continuation of the coast, and that the distance of protection should be reckoned from the outermost shoal of the bar; that a contrary construction would be attended with great inconvenience and mischief, by inviting the cruizers of Belligerent countries to take their station off the bar, and obstruct the security of the commerce of *America*.

In the Judgment, The Learned Judge over-ruled these arguments, and observed, That though in a maritime point of view, that interpretation of Coasts might be correct, yet this construction would be too vague for any Court of Justice to adopt on a question of this nature; that as the shoals vary along the coast, there would be no fixed rule by which the boundary would be ascertained; the different District Coasts of the *United States* would be obliged to apply various distances to the terms of the Acts, which require them to watch over all violations of territory within a marine league from the coast. That as this was a new and important question, his Honour had considered it with mature deliberation, and was clearly of opinion that the word Coasts could not have such an operation as the Counsel for the Libellants had given to it; but that it was intended to meas land as far as low water.—The result was, that the Bill exhibited in behalf of the *Africaine* was dismissed, but without costs, as it was deemed the duty of the Commercial Agent of the *French Republic* to bring the subject before the Court.—This Note is abstracted from a long, but probably a very imperfect account of that Case, which appeared in the *Charlestown* papers, and is inserted here, with the most respectful deference to the Gentlemen whose very able arguments are thus summarily stated, for the purpose of introducing the result of a trial, not unconnected with the present question, and decided in a manner, highly honourable to the Courts of *America*, and in vindication of the propriety of the conduct of the *British* cruizers.

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proach them. On these grounds it is submitted, that the claim of territory is not made out in that clear and distinct manner in which claims of this nature should be substantiated, and that the Court will therefore proceed to discuss the question of property, as to which many defects, and some affirmative grounds of suspicion arise, [*as specified*], which will make it a case of further proof.

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On the part of the Claimant, the King's Advocate and Laurence.—This is a claim of territory, alleged in the most solemn form by the directions of the Ambassador of the *United States*, resident in this country. It is a question which is at all times deserving of great attention; and is in the present instance supported by so many grounds of complaint against the conduct of the captors, that the Court cannot fail to consider it as a case of peculiar aggravation, and deserving to be marked with the *severest* reprehension and punishment which the judgment of this Court can inflict. It is not the case of a ship and cargo avowedly belonging to the enemy, and without any claim to restitution, but what arises as a matter of exception to the general course of law. It is, on the contrary, the case of a ship clothed with the most incontestible marks of neutral character, and belonging to the very shore which this captor was haunting, in violation of the territory of the country.—it is the case of a vessel which could scarcely have fallen into his hands, but owing to the *habits* under which the captor had been some time acting, of hovering upon the entrance of the River. That this had been the conduct of the privateer, is admitted in the affidavit of the commander himself, who, in

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describing the course of his proceedings in that river, unconsciously drops the following expression:—
“ Whilst we were standing on and off the *Mississippi*. (a)” A violation of territory arising out of such a system and continued plan of action, is not only more injurious to the honour and character, but more dangerous to the private trade, of the country aggrieved, and calls for the severest animadversion of the Court. If there was any room to doubt as to the exact distance at which this particular capture was made, the mere circumstance that it arose out of a continuation of such habits, would be sufficient to induce the Court to pronounce against the legality of such a capture; but the place seems not to be subject to any such doubt. The affidavit which has been given in by the claimant, in answer to the affidavit of the captain of the privateer, describes the course of his vessel to have been along the line of coast which is bounded by these islands, so that the situation of the vessel, at the commencement of the chase, was as much within the limits of territorial protection as the place of actual seizure. But is it a clear point, that the protection of territory is superseded by a previous chase?—No such principle has been established in the practice of this

(a) This became in the sequel the prominent feature in the case, as the Court directed the log-book of the privateer to be introduced to explain that circumstance, and in the event considered it is a principal ground of the sentence of costs and damages, which was ultimately pronounced.

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Court (a); and as to the *dictum* conveyed in the Treatise of *Bynkerhoek* on that subject, it must be taken to relate to contests very different from a capture of this kind. It evidently points to a case of previous contest of an hostile nature, "*dum feruet opus*," and must be understood only of cases in which the act in question was wholly unimpeachable on every other ground, and had arisen only out of the unforeseen flight of the enemy. The Court will perceive, however, that the place of the first pursuit is described, by reference to the chart, to have been within the limits of territory (c). If the Court should be of opinion on the evidence contained in these papers, that this was a capture unjustifiable in its commencement, abundant cause will arise, in the subsequent conduct of the parties, to aggravate the question of damages which usually accompany a sentence of restitution, on claims of this description. Having made this capture, the captor should at least have taken the prize to some of the prize jurisdictions that are established in the *West Indies*.

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(a) The Court seemed to intimate an opinion that there had been cases of this kind—A case was cited from the bar of the *John, Patrick*, 29th July 1760, in which the justification of a pursuit into the territory alleged, is set out in the Court Book 9, fol: 97, and it appeared afterwards that the seizure was not invalidated. The ship was condemned, though the particular reasons of the judgment are not extant.

(c) The evidence on this point was contradictory, and appears not to have been taken on either representation as the foundation of the judgment.

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But all attention to the convenience of the parties, and the demands of public justice is utterly disregarded; the captain is separated from his vessel, and they are both brought across the *Atlantic* to adjudication in this Court, to the great damage of the ship, and with the most evident inconvenience and loss of time to the master. Upon these grounds it is, that the justice of this Court is called upon, to award exemplary compensation for all the injuries that have been so wantonly committed.

15th Nov.

JUDGEMENT.

Sir William Scott.—I certainly shall not think proper to detain this ship and cargo any longer; because, setting aside the question of territory, the objections to the property are so very slender, that I may be excused from making any particular observations upon them. It appears, that the ship had been a *British* prize, and had been in the possession of a Mr. *Fletcher*, a subject of *New Orleans*, and consequently a *Spaniard*, during the last war; and therefore all that has been said on his appearing to be left in *Spain*, or of the master having been employed as the commander of a *Spanish* privateer during the last war, is nothing to the purpose. It is nothing more than what they had a perfect right to do, whilst *New Orleans* continued a port of the *Spanish* possessions; it lays no ground of suspicion either as to the property, or the national character of the vessel, in the present discussion. The ship appears to have been sold by Mr. *Fletcher* to another person at *New Orleans*, and there is a bill of sale on board. Then as to the cargo, it is objected that there are not the regular documents, no clearance;

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clearance ; but the want of these ordinary documents is accounted for by the nature of the trade, in which the vessel had been employed, in smuggling transactions with the *Spanish* main. There are papers on board purporting to contain accounts between the parties, which do, I think, lay a very fair foundation of credit for the representation which the master has given of the property. In such a case, if there is not the utmost formality of proof that might be required in other cases, I will not add the vexation of sending parties across the *Atlantic* to *New Orleans* for farther proof. I cannot but say, that, taking it at the outside to be a case of farther proof, it was a most unadvised capture. To bring a vessel so much out of her way for the chance only of catching an order for farther proof, is an act of indiscretion, which, I hope, will not often be committed by those, who are entrusted with His Majesty's commission. As to the question of costs and damages, I shall take a little time to deliberate upon it.

20th Nov. *Judgment resumed.*

Sir William Scott.—This ship was taken with a cargo of logwood and dollars on a voyage from the *Spanish* main to *New Orleans*. The destination of the vessel was not at all contested ; but the seizure was made, as it is expressed, in the log-book of the captor, “ because there was not any clearance or register on board.” These are defects which may certainly if unexplained justify a seizure. If a vessel pretending to be an *American* ship is without a register, and is carrying a cargo without any clearance, those circumstances, if they do not receive a fair and credible explanation, may justify a captor in bringing such a case
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to adjudication. In this case both these objections are, I think, satisfactorily removed ; because the vessel having been a *Spanish* vessel was therefore not entitled to an *American* register, and there was a sea letter or certificate of property on board. The cargo having been taken in upon the *Spanish* main on a smuggling transaction, could not have a clearance, or any of the formal documents that are usual in ordinary voyages. These circumstances, I have no doubt, were explained by the master, who, in his journal, and on his examination, appears to me to have given a fair representation, without any disposition to aggravate matters of complaint against the captors. I can have no doubt that these explanations were given. And there are documents and papers on board, which, relatively to the nature of the transaction, are, I think, abundantly sufficient. There was therefore no justifying cause of seizure; for as to what is stated in one of the affidavits, that the master had commanded a *Spanish* privateer in the last war, it is no more than what he had a perfect right to do. And whether he had on some former voyage broken the blockade of *St. Domingo* or not, is perfectly immaterial to the present case, and can form no part of the considerations upon which the seizure is to be justified.

The ship with this cargo on board was brought to *England* for adjudication ; and it lies on the captor to exonerate himself from the impropriety of this act ; because though the instructions to cruizers give something of a discretion to captors as to the port, to which they are to bring their prize, to *some convenient port*, it is a discretion which must be cautiously exercised, and with sound reason, so as to be justified in the Court before which the case is brought. It would be cause
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of infinite vexation, if neutral vessels taken on slight pretences at so great a distance as the coast of *America*, were to be dragged across the *Atlantic* for adjudication; more especially when this Country has established Courts in different islands in the *West Indies*, to prevent inconvenient recurrence to this Court, and to provide for claimants in that part of the world Justice at their own doors, that their commerce may be subject to as little interruption as possible, from the exercises of the rights of war, on the part of this country, in those seas. At the same time there may be circumstances that would justify such a procedure; as if a King's ship bound on the public service makes a capture in her course, such a vessel cannot depart from her instructions, but must proceed upon her original destination. That would be a case of necessity, arising out of the public service, for which States must make allowance reciprocally. But with respect to privateers, I cannot think that any such circumstances as are here set up can be pleaded, as a justifying excuse for such conduct on their part. It is said, "that the cruise had expired, and that it was time to come home." To which the answer is, that they should then have abstained from making any capture, when they could not stay to bring the case to adjudication in the proper Courts. That the crew were mutinous, will not do—The owner is answerable for his crew, and no legal excuse can be derived to him from their misconduct. That he had no agent at the *Bahamas* is equally insufficient; it was his fault, that he had not. If a person sends out a privateer to cruise in the *American* seas, it becomes his duty to appoint agents in some of the neighbouring ports, to which the law requires, that prizes taken in

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that part of the world should be brought to adjudication. The omission of this precaution has evidently been a cause of great inconvenience in the present case, which is at most a case of further proof, and in which, when an order for farther proof had been made, the claimant would have been entitled to his property on bail, and would have gone about his business; indeed, I cannot but think that the Court would more probably have decreed immediate restitution. Instead of that easy course, the ship and cargo are brought to a distant part of the world, for the mere chance of an order for farther proof. The ship is recorded on the log-book to have been seized for defect of papers; but there is more reason to suspect that the real cause of seizure proceeded, *not from what she had not*, but from *what she had*, the 13,000 dollars which were on board. Captors must understand that it is not the value of the cargo, but the want of proof, and the appearance of circumstances as to the property, that should induce a seizure, and that their conduct in this respect should not be influenced merely by the splendour of a large sum of money appearing in their sight.

When the ship was brought into this country, a claim was given of a grave nature, alledging a violation of the territory of the United States of *America*. This great leading fact has very properly been made a matter of much discussion, and charts have been laid before the Court to shew the place of capture, though with different representations from the adverse parties. The capture was made, it seems, at the mouth of the River *Mississippi*, and, as it is contended in the claim, within the boundaries of the United States.

States. We all know that the rule of law on this subject is "*terra dominium finitur, ubi finitur armorum vis*," and since the introduction of fire arms, that distance has usually been recognized to be about three miles from the shore. But it so happens in this case, that a question arises as to what is to be deemed the shore, since there are a number of little mud islands composed of earth and trees drifted down by the River, which form a kind of portico to the main land. It is contended that these are not to be considered as any part of the territory of *America*, that they are a sort of "*no mans land*," not of consistency enough to support the purposes of life, uninhabited, and resorted to, only, for shooting and taking birds nests. It is argued that the line of territory is to be taken only from the *Balise*, which is a fort raised on made land by the former *Spanish* possessors. I am of a different opinion; I think that the protection of territory is to be reckoned from these islands; and that they are the natural appendages of the coast on which they border, and from which indeed they are formed. Their elements are derived immediately from the territory, and on the principle of alluvium and increment, on which so much is to be found in the books of law, *Quod viæ fluminis de tuo prædio detraherit, & vicino prædio attulerit, palam tuum remanet*, (a) even if it had been carried over to an adjoining territory. Consider what the consequence would be if lands of this description were not considered as appertaining to the main land, and as comprized within its bounds of territory. If

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(a) Inst. L. 2. Tit. 1. § 21.

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they do not belong to the United States of *America*, any other power might occupy them; they might be embanked and fortified. What a thorn would this be in the side of *America*! It is physically possible at least that they might be so occupied by *European* nations, and then the command of the River would be no longer in *America*, but in such settlements. The possibility of such a consequence is enough to expose the fallacy of any arguments that are addressed to shew, that these islands are not to be considered as part of the territory of *America*. Whether they are composed of earth or solid rock, will not vary the right of dominion, for the right of dominion does not depend upon the texture of the soil.

I am of opinion that the right of territory is to be reckoned from those islands. That being established, it is not denied, that the actual capture took place within the distance of three miles from the islands, and at the very threshold of the river. But it is said that the act of capture is to be carried back to the commencement of the pursuit, and that if a contest begins before, it is lawful for a belligerent cruizer to follow, and to seize his prize within the territory of a neutral State. And the authority of *Bynkershoek* is cited on this point. True it is, that that great man does intimate an opinion of his own to that effect; but with many qualifications, and as an opinion, which he did not find to have been adopted by any other writers. I confess I should have been inclined to have gone along with him, to this extent, that if a cruizer, which had before acted in a manner entirely unexceptionable, and free from all violation of territory, had summoned a vessel to sub-

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mit to examination and search, and that vessel had fled to such places as these, entirely uninhabited, and the cruizer had without injury or annoyance to any person whatever, quietly taken possession of his prey, it would be stretching the point too hardly against the captor, to say that on this account only it should be held an illegal capture. If nothing objectionable had appeared in the conduct of the captors before, the mere following to such a place as this is, would I think not invalidate a seizure otherwise just and lawful.

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But that brings me to a part of the case, on which I am of opinion that the privateer has laid herself open to great reprehension. Captors must understand, that they are not to station themselves in the mouth of a neutral River, for the purpose of exercising the rights of war from that River, much less in the very River itself. It appears from the Privateer's own log-book that this vessel has done both; and as to any attempt to shelter this conduct under the example of King's ships, which I do not believe, and which, if true, would be no justification to others, captors must I say be admonished, that the practice is altogether indefensible, and that if King's ships should be guilty of such misconduct, they would be as much subject to censure as other cruizers. It is unnecessary to go over all the entries in the log. The captors appear by their own description *to have been standing off and on*, obtaining information at the *Balise*, overhauling vessels in their course down the River, and making the River as much subservient to the purposes of war, as if it had been a river of their own country. This is an inconvenience which the States of *America* are called upon to resist, and which ~~this~~ Court is bound on every principle to discourage
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and correct. With respect to one vessel, it appears that the *Bilboa*, under *Spanish* colours, and an undoubted *Spanish* ship had been captured and carried into the River; and it was stated in an affidavit which was exhibited to account for the absence of the usual witnesses in that case, *that the prisoners had escaped*. The cause was brought on upon the evidence of the releasing witnesses under this representation. It now appears by an entry in this log "*that the prisoners were set on shore*;"—an act highly unjustifiable, in its own nature, independent of the deception with which it has been accompanied. The prisoners are the King's prisoners, and captors are particularly enjoined by the instructions (a) not to release any prisoners

(a) "Whereas it has been represented to us, that either through misapprehension of, or in disobedience to, the true intent and meaning of the tenth article of our instructions respectively bearing date the 17th of *May*, 1803, and the 16th of *June*, 1803; the captains or commanding officers of ships having letters of marque and reprisals, have landed their prisoners either at ports where no depots for the reception of prisoners of war are established, or have otherwise neglected to deliver them over to persons appointed in the sea port towns to take charge of the prisoners: We, taking the premises into consideration, and apprehending the great inconvenience therefrom to the public service, do hereby strictly direct and enjoin all captains and commanding officers of ships and vessels having letters of marque and reprisals, that they do carry all prisoners taken on board any prizes to ports at which there are or shall be established depots for the reception of prisoners of war, there to deliver over such prisoners to the agents appointed by our commissioners of transports, or to such other person as shall be duly appointed to receive and take charge of prisoners of war; and that no commander or any officer of any ship or vessel having a letter of marque

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soners belonging to the ships of the enemy, and they violate their duty whenever they do. When I advert to the imposition that has been put upon the Court in that transaction, how can I trust myself to any representation coming from the same persons. Indeed I think, I can perceive strong traits of bad faith running throughout the whole conduct of the captors in the present case. In answer to the complaint that has been made against the captors for bringing this prize to *England*, it was said, that it was done at the desire of the master of the captured vessel; though in the affidavit of the master, which is not contradicted, it is sworn, “ that the captors offered to set him on shore,

and reprisal, do presume, upon any pretence whatsoever, to land, release, or deliver over any prisoners of war at any other place, or in any other manner than as aforesaid.”

The Editor takes this opportunity of suggesting, as a piece of information that may be of important use to Gentlemen, with whom the proceedings in Prize Causes necessarily commence, (the Commanders, and Cruizers of all descriptions in the naval service of the Country), that it is not an unfrequent cause of dissatisfaction with the Court, that those who have the management and controul over captured vessels, omit in many instances to attend to the duty enjoined by the general law, and promulged in a declaratory form in these instructions, with respect to the custody of prisoners in general. The effect of this omission is more felt, as it counteracts the very ancient, and almost fundamental rule of Prize Proceedings, which requires that the master of the captured vessel, whether an Enemy, or neutral, should be brought in for examination. The Court has invariably withheld its sentence of condemnation, even in the clearest cases, where this omission has appeared, until it has been supplied, or accounted for in a satisfactory manner. The inevitable consequence of such neglect must be, in all cases where it occurs, to retard the benefit that may otherwise be expected to result from the capture.

but

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but that he refused to be separated from his cargo.²⁴
The conduct of the captors has on all points been highly reprehensible. Looking to all the circumstances of previous misconduct, I feel myself bound to pronounce, that there has been a violation of territory, and that as to the question of property, there was not sufficient ground of seizure; and that these acts of misconduct have been further aggravated, by bringing the vessel to *England*, without any necessity that can justify such a measure. In such a case it would be falling short of the justice due to the violated rights of *America*, and to the individuals who have sustained injury by such misconduct, if I did not follow up the restitution which has passed on the former day, with a decree of costs and damages.

Before the Lords(a) Commissioners of Appeal in Prize Causes.

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THE WILLIAM, TREFRY.

THIS was a question on the continuity of a voyage in the colonial trade of the enemy, brought by appeal from the Vice Admiralty Court at *Halifax*, where the ship and cargo, taken on a destination to *Bilboa* in *Spain*, and claimed on behalf of Messrs. *W. and N. Hooper* of *Marblehead* in the state of *Massachusetts*, had been condemned 17th July 1800.

It appeared in evidence, that the ship had gone to *Martinique*, where the outward cargo was disposed of; that she then proceeded to *La Guira*, and took on board a cargo of cocoa, the property of the owners, which was brought to *Marblehead* on the 29th May, and unladen; that the ship was then cleaned and slightly repaired, and again took on board the chief part of the former cargo, with some sugars brought from the *Havannah* in other ships, and purchased by the owners, and sailed on or before the 7th June, upon a destination to *Bilboa*. Among the papers was a certificate from the collector of the

(a) The Editor is happy to have it in his power to insert in his collection of Admiralty Reports, this elaborate Judgment of the Court of Appeal, which contains also a reference to all the principal cases that had occurred before that Court, relating to the continuity of voyages in the Colonial Trade of the Enemy.

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customs, "that this vessel had entered and landed a cargo of cocoa belonging to Messrs. *W. and N. Hooper*, and that the duties had been secured agreeable to law, and that the said cargo had been re-shipped on board this vessel bound for *Bilboa*; and that her cargo, consisting of cocoa, sugar, and fish, was the property of the said *W. and N. Hooper*."

On the 7th *May* 1804, The cause came on to be heard before the Lords of Appeal upon the original evidence, when the case was argued on the principle of continuity, and the application of that principle to the circumstances of the present case, by the King's Advocate and the Attorney General, on the part of the captor, and by Mr. *Dallas* and Dr. *Arnold*, on the part of the appellant. The Lords "pronounced for the appeal, reversed the sentence appealed from, and retained the principal cause, therein admitted the claim for the ship and cargo, pronounced the said cargo, except 70 hogsheads of cocoa and five bags of cocoa to have belonged as claimed, and dismissed the bail given in the Court below to answer the appeal in respect thereto; but directed farther proof to be made of the importation of the said cocoa into, and exportation from, the port of *Marblehead* in *America*, and the payment of duties thereon, within nine months."

In obedience to that decree farther proof was exhibited, consisting of sundry documents (a):

On

(a) Attestation of *W. and N. Hooper*, 7th *November* 1804.

Certificate of *Joseph Wilson*, collector of the customs, stating the importation of the goods in question, dated 7th *November* 1804.

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On this proof the cause was farther argued; and on the 11th *March* 1806, The judgment of the Court of Appeal was delivered by the Right Honourable Sir *William Grant*, Master of the Rolls, in the following terms:

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JUDGMENT,

Sir William Grant.—The question in this case is, whether that part of the cargo which has been the subject of further proof, and which, it is admitted, was, at the time of the capture, going to *Spain*, is to be considered as coming directly from *Laguira* within the meaning of his Majesty's instructions. According to our understanding of the law, it is only from those

Account of bonds given by *William Hooper* and *John Trefry*, to secure the duties on the importation of goods on board the *William* from *La Guira*.—Copy of entry of the goods imported in the *William* from *La Guira*, *May* 1800.—Affidavit of the weigher and gauger at *Marblehead*, that he weighed 61,345lbs. which were landed from the *William*, *Trefry*, and that the same was put into 102 casks and five bags. Sworn at *Marblehead*, 7th *November* 1804.—Ships articles between the master and the mariner of the *William*, *Trefry*, for a voyage from *Marblehead* to *Martinico*, or elsewhere in the *West Indies*, and back to *Marblehead*, dated *February* 1800.—Bond given by *W. Hooper* and *John Trefry*, to pay to the United States the sum of 1239 dollars, dated 29th *May* 1800.—Policy of insurance on the *William* and cargo, from *Marblehead* to the *West Indies*, and from thence to her port of discharge in the United States, dated *Salem*, *March* 26th, 1800.—A price current at *Bilboa* the 8th *February* 1800.—Bond entered into, *W. Hooper* and *John Trefry*, in the sum of 1848 dollars, on the exportation of 79 casks and five bags of cocoa from *Marblehead* to *Bilboa*, dated *Marblehead*, 5th *June* 1800.

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instructions that neutrals derive any right of carrying on with the colonies of our enemies, in time of war, a trade from which they were excluded in time of peace. The instructions had not permitted the direct trade between the hostile colony and its mother country, but had, on the contrary ordered all vessels engaged in it to be brought in for lawful adjudication; and what the present claimants (a) accordingly maintain, is not that they could carry

(a) The principal documents exhibited on the part of the claimant are subjoined at length, for the purpose of exhibiting a more accurate view of the course in which the continuous trade between the colonies of the Enemy, and the mother Country has been conducted, as to the forms of importation in *America*.

Arrestation of
the claimants.

" *William Hooper* and *Nathaniel Hooper*, both of *Marblehead*, in the state of *Massachusetts*, in the United States of *America*, merchants, do depose and say, that they are citizens of the united states, and were born in *Marblehead* aforesaid, and in the month of *February*, in the year of our Lord eighteen hundred, shipped on board the schooner *William* belonging to them, whereof *John Trefry* was then master, a cargo consisting of cod fish, fowls, and lumber, and ordered him to proceed with said cargo from said *Marblehead* to *Martinico*, then in possession of the *British*, in the *West Indies*, and there sell and dispose of said cargo for cash, and with the proceeds thereof, and one hundred doubloons which they at the same time shipped in gold, to proceed to *Laguaira* on the *Spanish* main, and there lay out the same in purchasing a cargo of cocoa; that the said *Trefry* proceeded on said voyage with said cargo on board from said *Marblehead* to said *Martinico*, and there sold and disposed of the same for cash, and with the proceeds thereof, and said one hundred doubloons in gold, proceeded to said *Laguaira*, and there purchased a cargo of cocoa, and having shipped said cocoa in bulk on board the said schooner, proceeded with it on board from said *Laguaira* to *Marblehead* aforesaid, and arrived there

carry the produce of *Laguira* directly to *Spain*; but that they were not so carrying the cargo in question, inasmuch

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on the twenty-ninth day of May, in the year of our Lord eighteen hundred, where the said cocoa was entered at the custom-house, and the duties thereon secured to be paid according to law. And these deponents further say, that after entering the said cocoa, and securing the duties thereon, the same was landed in said *Marblehead*, and there inspected and weighed by the officers of the customs, and put into casks and bags, G, and the said schooner and crew discharged, the hands paid off, and the voyage ended, as will appear by the original shipping paper hereto annexed, marked A, (a) (a) *Infra* 362. which they aver to be true and genuine; that the whole of the said cocoa after it was landed was put into casks and bags, and consisted of seventy-nine casks and five bags, which belonged to them, and twenty three casks which were the proceeds of an adventure shipped on board the said schooner by *Robert Hooper* of *Marblehead*, their father, and belonged solely to him. And these deponents further say, that the whole of the duties on the said cocoa (and on one barrel of coffee and one barrel of sugar, the adventures of the master and mate) were secured to be paid by the bond hereto annexed marked B, (b) which they aver to be the original bond which was given at the Custom-house to secure said duties, as will appear by the paper writing marked A, annexed to the collector's certificate; that on re-shipping the said cocoa or any part thereof to any foreign port whatever, they were entitled by the laws of the United States to receive a drawback on the same, reserving to the said United States one and one quarter per centum, and on their re-shipping it to *Bilboa*, as is hereinafter mentioned, debentures for the drawback were accordingly issued by the then collector, *Samuel R. Gerry*, who has since been removed from office, for the sum of nine hundred fifty-five dollars and sixty-six cents on their adventure, and the sum of two hundred and fifty-five dollars and ninety cents on their father's adventure, which was afterwards re-shipped by him; that the said debentures were applied to cancel so much of the said impost bond when it became due, the said impost bond amounting in the whole to the sum of twelve hundred and thirty-nine dollars and eighty-two cents. the said debentures to the sum

(b) *Infra* 362.

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inasmuch as the voyage in which it was taken was a voyage from *North America*, and not directly from a colony of *Spain*.

What

of twelve hundred and eleven dollars and fifty-six cents. and the balance due on the said impost bond to the sum of twenty-eight dollars and twenty-six cents. which was paid by them to the said collector in money. And these deponents further say, that they did not receive any benefit from the remission of duties upon exporting the said cocoa that would not have been received by them or any other person, if the same had been imported from a *British* colony or elsewhere. And these deponents do further say, that for several years previous to their said schooner's sailing on the voyage aforesaid they had been engaged in foreign commerce, and employed some of their vessels in the *European* and some of them in the *West India* trade; and that when they ordered the master of said schooner to proceed to *Laguaira* and purchase cocoa, it was with the single view of bringing it to the United States; and that they then had no intention or expectation of exporting it in the said schooner to *Spain*, but on its arriving at *Marblehead*, on the twenty-ninth of *May* eighteen hundred as before-mentioned, they found it could not be sold to advantage in this country, and would probably, from the information they had received from the price current hereunto annexed, marked N, inclosed to them by *Ventura Gomez de la Torre* and *Grandsons*, and which they received in the beginning of *May* eighteen hundred, bring a much better price in *Spain*, they determined on sending it to that market; and having no other vessel at home in which they could send it, they re-shipped it on board the said schooner *William*, and consigned the same to the master, and ordered him to proceed in her to *Bilboa* in the kingdom of *Spain*, and there sell and dispose of the same on their account and risk, and proceed directly home; that while the said schooner was proceeding on her said voyage she was taken and carried into *Hali-fax* by one of his Britannic Majesty's ships of war, and there condemned as prize. And these deponents expressly declare, that the afore-mentioned voyage to *Martinico* and *Laguaira* was not undertaken with a view or any intention of procuring cocoa, or any produce of a *Spanish* colony, and bringing the same to the United States

What then, with reference to this subject, is to be considered as a direct voyage from one place to another?

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States, landing and naturalizing it, and then shipping it in the same or any other bottom to *Spain*; but that their re-shipping the said cocoa for *Bilboa* was altogether accidental, owing to the state of the markets in the two countries aforesaid, at the time the said schooner arrived therewith at said *Marblehead* as is herein-before stated; and that if they had exported it to any other foreign port, or had sold it here, and the purchasers had exported it, the deponents or such purchasers would have been entitled to the same drawback on exporting the same. And these deponents do further declare, that the bond hereto annexed, marked O, (a) is the original bond given by the said *William Hooper* and *John Trefry* to the United States on exporting said cocoa as before-mentioned, and that the same is true and genuine. (a) infra 362.

I, *Joseph Wilson*, collector of the customs of the United States of *America* for the district of *Marblehead* and *Lynn*, do hereby certify and attest, that on the twenty ninth day of *May* eighteen hundred, the schooner *William*, *John Trefry* master, entered at the custom-house at *Marblehead*, sixty-one thousand three hundred and forty-five pounds of cocoa, one barrel of coffee, and one barrel of sugar, which were imported from *Laguira*, and belonged to *William Hooper* and *Nathaniel Hooper*, of *Marblehead* aforesaid, who are citizens of the United States. And I do further certify and attest, that the afore mentioned cocoa, coffee, and sugar, were all duly landed from the said schooner at *Marblehead*, and that the said *William Hooper* and *John Trefry*, on the twenty-ninth day of *May* eighteen hundred, gave bonds to *Samuel R. Gerry*, who was then collector for the district of *Marblehead* and *Lynn*, (but who has since been removed from office) to secure the payment of the impost duties imposed by law on the above-mentioned cocoa, coffee, and sugar, and that the said bonds were paid by debentures that were issued by the said collector for the drawback due on the said cocoa on its being exported for *Bilboa*, as is hereafter mentioned, the sum of twelve hundred and eleven dollars and fifty-six cents, and the sum

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the collector of
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another? Nobody has ever supposed that a mere deviation from the straightest and shortest course, in which
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of twenty-eight dollars and twenty-six cents in cash, being the whole amount of the impost duties on said cocoa, all which appears by the books and papers of the said collector now in my custody. And I do further certify and attest, that on the fifth day of *June* eighteen hundred, seventy-nine casks and five bags of the above-mentioned cocoa was entered at the custom-house in said *Marblehead*, as being exported by the said *William Hooper* and *Nathaniel Hooper* on board the schooner *William*, *John Trefry* master, for *Bilboa*, and on the ninth day of *June* eighteen hundred, twenty-three casks more of the said cocoa were entered at the said custom-house as being exported by *Robert Hooper* of said *Marblehead*, merchant on board the schooner *Saratoga*, *Ebenezer Graves* junior, master, for *Bilboa*. And I do further certify and attest, that the bond described in the paper-writing hereto annexed, marked A, is the true and accurate description of the bond given at the said custom-house to secure the duties upon the goods imported in the schooner *William* therein mentioned; and that the paper-writing hereunto annexed, marked B, is a true and genuine copy of the entry of said goods as made at the said custom-house, as also appears by the books and papers of the said collector now in my custody. And I do further certify and attest, that the said *William Hooper* and *Nathaniel Hooper* and *Robert Hooper* did not pay any export duties on exporting and clearing out the afore said cocoa for *Bilboa*, no part of said goods being by law subjected to pay any export duties on their being exported.

It witness whereof I have hereto set my hand and seal of office, at *Marblehead* afore said, this seventh day of *November* 1804.

JOSEPH WILSON, Collector.

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the voyage could be performed, would change its denomination, and make it cease to be a direct one within

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(A.)

Account of bonds given by *William Hooper*, merchant, and *John Trefry*, mariner, for goods imported in the schooner *William*, *John Trefry* master, from *Laguira*, which vessel entered on the 29th day of *May* 1800, at the Custom-house of the port of *Marblehead*.

Account of
bonds given by
the claimants,
&c.

Date Bonds.	When paid.	No. of Bonds.	Obligors Names	Dollars.	Cts.
1800.	1800.		<i>William Hooper</i> ,		
<i>May</i> 29th.	<i>August</i> 29.	14	<i>John Trefry</i> .	1239	82

(B.)

Entry of goods consigned to captain *William Hooper*, imported in the schooner *William*, *John Trefry* master, from *Laguira*, *May* 29th, 1800.

Entry of goods,
&c.

Marks.	Numbers.	Packages and Contents	Neat Value.	Drs.	Duty.
	61345 lb.	Cocoa in bulk,	at 2 Cts.	1226	90
B.	1	Barrel Coffee, 178 lb. Nt.	at 5 Cts.	8	90
Do.	1	Barrel Sugar, 201 lb. Nt.	at 2 Cts.	4	02
				Dollars	1239 82

I solemnly swear that the above entry contains the whole of the goods, wares, and merchandizes imported by me, or to me consigned, in the schooner *William*, *John Trefry* master, from *Laguira*, according to my best belief and knowledge; and that the invoices thereof now produced, contains, to the best of my knowledge and belief, the neat prime cost thereof; and that if I afterwards discover any other or greater quantity than is contained in the above entry I will make due report and entry thereof.

WM. HOOPER.

Certificate

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within the intendment of the instructions. Nothing can depend on the degree or the direction of the deviation

(O.)

Certificate of obligations entered into on re-shipment, debenture, &c. Nov. 9th 1800.

Know all men by these presents, that we *William Hooper* of *Marblehead*, in the county of *Essex*, merchant, principal, and *John Trefry*, of said *Marblehead*, mariner, surety, are held and stand firmly bound to the United States of *America*, in the sum of eighteen hundred and forty-eight dollars forty-eight cents, for the payment of which, well and truly to be made, we bind ourselves, heirs, executors, and administrators, jointly and severally, by these presents.

Witness our hands and seals, this fifth Day of *June*, year one thousand eight hundred.

Whereas captain *William Hooper* imported into the port of *Marblehead* the following merchandize, in the schooner *William* of *Marblehead*, *John Trefry* master, from *Laguaira*, on the twenty-ninth day of *May*, eighteen hundred, to wit :

	Dollars.	Cts.
79 Casks of cocoa, wt. 47522 lb. at 2 Cents,	-	950 44
5 Bags of cocoa, wt. 878 lb. at 2 Cents,	-	17 56
	48400	968 00
	Deduct $1\frac{1}{4}$ per Cent.	12 10

Granted debenture, No. 95, pay. Aug. 29, 1800, for 955 90

and being re-shipped by the aforesaid *William Hooper*, in order to export the same in the schooner *William* of *Marblehead*, *John Trefry* master, now in the port of *Marblehead*, and bound for *Bilboa*.

The conditions of this obligation therefore is such, that if the said merchandize, or any part thereof, be not reloaded in any port or place within the limits of the United States, as settled by the late treaty of peace, and if the certificates and other proofs required

viation—whether it be of more or fewer leagues, whether towards the coast of *Africa*, or towards that of *America*. Neither will it be contended that the point from which the commencement of a voyage is to be reckoned changes as often as the ship stops in the course of it; nor will it the more change, because a party may choose arbitrarily by the ship's papers, or otherwise, to give the name of a distinct voyage to each stage of a ship's progress. The act of shifting the cargo from the ship to the shore, and from the shore back again into the ship, does not necessarily amount to the termination of one voyage and the commencement of another. It may be wholly unconnected with any purpose of importation into the place where it is done: Supposing the landing to be merely for the purpose of airing or drying the goods, or of repairing the ship, would any man think of describing the voyage as beginning at the place where it happened to become necessary to go through such a process? Again, let it be supposed that the party has a motive for desiring to make the voyage appear to begin at some other place than that of the original lading, and that he therefore lands the cargo purely and solely for the purpose of enabling himself to affirm, that it was at such other place that the

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quired by law of the delivery of the same at the aforesaid port of *Bilboa*, or at any port or place without the United States, shall be produced at this office within one year from the date hereof, then this obligation shall be null and void, but otherwise shall be and remain in full force and virtue.

WILLIAM HOOPER, (L.S.)
JOHN TREFRY, (L.S.)

Signed, sealed, and delivered
in the presence of

PETER GREEN.

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goods were taken on board, would this contrivance at all alter the truth of the fact? Would not the real voyage still be from the place of the original shipment, notwithstanding the attempt to give it the appearance of having begun from a different place? The truth may not always be discernible, but when it is discovered, it is according to the truth and not according to the fiction, that we are to give to the transaction its character and denomination. If the voyage from the place of lading be not really ended, it matters not by what acts the party may have evinced his desire of making it appear to have been ended. That those acts have been attended with trouble and expence cannot alter their quality or their effect. The trouble and expence may weigh as circumstances of evidence, to shew the purpose for which the acts were done; but if the evasive purpose be admitted or proved, we can never be bound to accept as a substitute for the observance of the law, the means, however operose, which have been employed to cover a breach of it. Between the actual importation by which a voyage is really ended, and the colourable importation which is to give it the appearance of being ended, there must necessarily be a great resemblance. The acts to be done must be almost entirely the same; but there is this difference between them.—The landing of the cargo the entry at the custom-house, and the payment of such duties as the law of the place requires, are *necessary ingredients* in a genuine importation; the true purpose of the owner cannot be effected without them. But in a fictitious importation they are *mere voluntary ceremonies*, which have no natural connection whatever with the purpose of sending on the cargo

to another market, and which, therefore, would never be resorted to by a person entertaining that purpose, except with a view of giving to the voyage which he has resolved to continue, the appearance of being broken by an importation, which he has resolved not really to make.

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Now what is the case immediately before us? The cargo in question was taken on board at *Laguaira*. It was at the time of the capture proceeding to *Spain*; but the ship had touched at an *American* port. The cargo was landed and entered at the custom-house, and a bond was given for duties to the amount of 1239 dollars. The cargo was re-shipped, and a debenture for 1211 dollars by way of drawback was obtained. All this passed in the course of a few days. The vessel arrived at *Marblehead* on the 29th of *May*; on that day the bond for securing the duties was given. On the 30th and 31st the goods were landed, weighed, and packed. The permit to ship them is dated the 1st of *June*, and on the 3d of *June* the vessel is cleared out as laden, and ready to proceed to sea. We are frequently obliged to collect the purpose from the circumstances of the transaction. The landing thus almost instantaneously followed by the re-shipment, has little appearance of having been made with a view to actual importation; but it is not upon inference that the conclusion in this case is left to rest. The claimants instead of shewing that they really did import this cargo, have, in their attestation, stated the reasons which determined them not to import it. They say indeed, that when they ordered it to be purchased, "it was with the single view of bringing it to the United States, and that they then had no intention

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or expectation of exporting it in the *said schooner to Spain.*" Supposing that from this somewhat ambiguous statement we are to collect that their original intention was to have imported this cargo into *America*, with a view only to the *American* market, yet their intention had been changed before the arrival of the vessel. For they state that *in the beginning of May* they had received accounts of the prices of cocoa in *Spain*, which satisfied them that it would sell much better there than in *America*, and that they had therefore determined to send it to the *Spanish* market. Nothing is alledged to have happened between the landing of the cargo and its re-shipment, that could have the least influence on their determination. It was not in that short interval that *American* prices fell, or that information of the higher prices in *Spain* had been received. Knowing beforehand the comparative state of the two markets, they neither tried nor meant to try that of *America*, but proceeded with all possible expedition to go through the forms which have been before enumerated. If the continuity of the voyage remains unbroken, it is immaterial whether it be by the prosecution of an original purpose to continue it, as in the case of the *Essex*, or, as in this case, by the relinquishment of an original purpose to have brought it to a termination in *America*. It can never be contended, that an intention to import once entertained is equivalent to importation. And it would be a contradiction in terms to say that by acts done after the original intention has been abandoned, such original intention has been carried into execution. Why should a cargo, which there was to be no attempt to sell in *America*, have been entered at an *American* custom-house, and voluntarily subjected to the payment

ment of any, even the most trifling duty? Not because importation was, or in such a case could be intended, but because it was thought expedient that something should be done, which in a *British* Prize Court might pass for importation. Indeed the claimants seem to have conceived that the enquiry to be made here was, *not*, whether the importation was real or pretended, but whether the pretence had assumed a particular form, and was accompanied with certain circumstances which by some positive rule were, in all cases, to stand for importation, or to be conclusive evidence of it. And it has, I understand, been said that our departure from that supposed rule in the case of the *Effex(a)*, *Orne*, was a surprize upon the merchants of *America*, who had by our former decisions been led to believe, that proof of landing and payment of duties in *America* would, in every case, be held absolutely decisive of the legality of the voyage.

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How far even that rule would have been departed from by the decision in the case of the *Effex* will hereafter be considered. But after having looked very attentively into all the cases in which, as far as I am aware, this sort of question has occurred, I conceive, not only that it will be impossible to point out a judgment, in which any such unqualified doctrine has been laid down, but that the judgments antecedent to that in the *Effex* had clearly and unequivocally negatived the existence of the alledged rule of decision.

The first case of the kind, that of the *Polly*, *Lafky*, occurred in the High Court of Admiralty, in *February* 1800. The learned Judge of that Court expressly disclaimed the attempt to define what should be deemed universally the test of a *bond fide* importation. He did

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did indeed lay great and just stress on the payment of the *American* import duties, which was there sworn to have been actually made. But still it was as *evidence* of *bonâ fide* importation. The very statement, that the thing in question was the *bonâ fides* of the importation, did of necessity exclude the supposition that one uniform effect was, in all cases, to be ascribed to a given set of circumstances, without regard to the manner in which their effect as evidence might be varied by other circumstances, with which, in different cases, they might be found contrasted or combined. The first case of this class which I believe came before this board, was that of the *Mercury, Roberts*, in *January 1802*. By all the documents found on board, the cargo appeared to have been laden at *Charlestown*; and among those documents there was an attestation sworn at the custom-house, that all the parts of the cargo which were of foreign growth or manufacture, had been legally imported, and the duties thereon paid or secured. It came out however, in the depositions of the witnesses examined on the standing interrogatories, that the cargo had been laden at the *Havannah*, and that it never had been landed at *Charlestown*, the place of the alledged shipment. It being evident that the touching at *Charlestown*, was for the mere purpose of giving to the voyage the colour and appearance of having begun there, we affirmed the sentence of condemnation, without previously endeavouring to ascertain, whether any duties had really been paid in *America*. The true nature of the transaction being clearly ascertained, it seemed immaterial to enquire, whether the payment of duties had been one of the means employed to disguise it.

The

The next case which occurred, was that of the *Eagle, Weeks*, in May 1803. By the original evidence it appeared that the cargo had come from *Bilboa* to *Philadelphia*, where it had been landed, and whence it was proceeding in the same vessel to the *Havannah*. The condemnation in the Court below had proceeded on the ground that the cargo was contraband of war. But the only question here was with regard to the continuity of the voyage. As to that, further proof was ordered. We had the landing at *Philadelphia* already in evidence; therefore, according to the supposed rule, the only other circumstance, with regard to which proof could be material, was the payment of duties; But we did not so limit our enquiry. In order to endeavour to discover the real purpose and intention of the owner, we called for the orders which he had given concerning the purchase and shipment of the cargo at *Bilboa*, and also for the insurances made from thence. Had it clearly appeared from those orders or insurances that the cargo was from the beginning destined for the *Havannah*, could it be supposed that we would pay no regard to that result of the enquiry which we had directed, but would ascribe to the payment of duties such a conclusive effect, as would have rendered every other part of the enquiry perfectly nugatory? When the case came back on the further proof, nothing appeared in the letters of orders to shew a destination to the *Havannah*. No insurance had been effected on the first branch of the voyage. It was positively sworn that the import duties, amounting to 1333 dollars, *had been actually paid*; also that the cargo had been warehoused at *Philadelphia*, and advertised and intended for sale there, but that not

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being able to obtain a price that would answer, the owner had resolved to ship it for the *Havannah*. Giving a credit to this evidence which, it now appears, it did not deserve, we thought that a complete *bona fide* importation had taken place, and therefore decreed restitution of the ship and cargo.

The case of the schooner *Freeport*, and the original hearing of the *Effex*, *Orne*, came on in *August* 1803. The *Freeport* had carried from *Cadiz* to *Boston* the cargo with which at the time of the capture it was proceeding to one of the *Spanish* colonies. The cargo had been landed and remained some time on shore; but the master, who was half owner of both ship and cargo, admitted in his claim that the cargo was intended for the *Spanish West Indian* market, and did not even assert any purpose of importation into *America*. We therefore affirmed the sentence of condemnation. The cargo having been landed, it might be taken for granted that whatever duties were payable had been paid. But as the case stood, we thought that fact immaterial, and therefore directed no enquiry with regard to it.

In the case of the *Effex* the cargo had been brought from *Barcelona* to *Salem*, and after having been landed and re-shipped was proceeding to the *Havannah*. From the original evidence there was great reason to believe that the master had from the beginning destined the cargo for the *Spanish* colony; but as what had passed at *Salem*, or what had been the conduct of the owner after the ship's arrival there, did not distinctly appear, it was thought right to give him an opportunity of entering into further proof of the alleged im-

portation. It had never been denied that, in a doubtful case, payment of duties would have great weight, and therefore the further proof was particularly directed to that point. But it having been suggested, that in these cases, the duties charged on landing were almost entirely drawn back on the re-shipment, we also called for an account of the drawbacks, if any, which had been received. This additional enquiry sufficiently shewed, that the same effect would not be ascribed to a nominal, as to an actual payment of import duties. With a view of further elucidating the transaction, the insurances made, if any, were directed to be produced. The final event of this case will be afterwards noticed.

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The next case was that which is the immediate subject of the present judgment. It was first heard in May 1804. By the original evidence the landing of the cargo at *Marblehead* was proved. It was also in proof that the duties had been secured according to law. So the owners swore—to the custom-house certified. It was to be supposed that duties which were secured were one day to be paid; and it was doubtless meant to be so understood here: For the fact was suppressed, that at the moment when the certificate issued from the custom-house, and the oath was made by the owners, a debenture had been granted, which in effect extinguished almost the whole of the duties that had been previously secured. Here was what is now said to have been by us held conclusive evidence of importation. But what did we determine? That the importation was not sufficiently proved, and therefore we directed further proof of it to be made. Could any *American*, who at all attended to the proceedings of this Court, be really surprised by our again deciding

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a twelvemonth afterwards, that such evidence was not conclusive? Yet this effect I mean, of surprize, is ascribed to our decision in the *Effex*, in May 1805. Upon the further proof it appeared to us that no real importation into *Salem* had taken place, or had ever been in the contemplation of the parties to the transaction. The sentence of condemnation was therefore affirmed. As it is not the object of this review of the cases to discuss the merits of the particular judgments, but only to examine whether there be any inconsistency in their principles, it is unnecessary to advert to any other point in the last-mentioned decision, than its alledged novelty, in departing from the supposed principle of holding that landing and payment of duties in *America* did, absolutely, and under all circumstances, legalize the subsequent voyage. I have shewn that there was not one decision in which any such principle had been asserted or implied, and that there were at least two decisions which stood in direct contradiction to it, that in the *Freeport* in 1803, and that in the *William* in 1804.

But supposing that we had uniformly held that payment of the import duties furnished conclusive evidence of importation, would there have been any inconsistency or contradiction in holding that the mere act of giving a bond for an amount of duties, of which only a very insignificant part was ever to be paid, could not have the same effect as the actual payment of such amount? The further proof in the *Effex* first brought distinctly before us the real state of the fact in this particular. It has been already mentioned that we had called for an account of the drawbacks, if any, that had been received. This produced the information

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tion that although the duties secured amounted to 5278 dollars, yet a debenture was immediately afterwards given for no less than 5080 dollars; so that on that valuable cargo no more than 198 dollars would be ultimately payable, which sum is said to be more than compensated by the advantage arising from the negotiability of the debenture. In the case of the *Eagle*, immediately preceding, it had been sworn by the owner and certified by the custom house, that the duties, amounting to ¹³³³ dollars, not an unsubstantial sum on the not very valuable cargo of a small vessel of 110 tons, *had been actually paid*. In the *Polly*, *Lafky*, it was sworn generally that the duties were paid: In the *Mercury* that they were paid or secured: In the *William* that they were secured: Not a word was said about drawbacks. It was therefore natural for us to understand *American* claimants, as they certainly wished we should understand them, to be speaking of the payment of such duties as were chargeable on importation into *America*, and of a security that would make the whole amount secured become payable at some future day. If we had ascribed to the fact, as we believed it to exist, ever so decisive an effect, I again ask where would be the inconsistency in denying the same effect to a fact of a totally different nature? It must not be supposed that we pretend to judge, what duties it may be proper for the *American* Government to exact or to remit, neither do we contend that an importation cannot be genuine because a high duty has not been paid. All we say is, that in the nature of the thing, the payment of a slight duty does not tend, in the same degree, to establish the *bona fides* of an importation, as the payment of a heavy duty would have done. We

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never held that either would necessarily outweigh all the evidence which could possibly be put into the opposite scale; but that the one has less weight than the other is obvious to every man's apprehension.

On the whole, I trust, I have demonstrated that we did not, in the case of the *Essex*, and that we do not, in the case now before us, depart from any principle which we have ever adopted. The application to this case of the principles on which we really have proceeded has been already shewn. The consequence is that the voyage was illegal, and that the sentence of condemnation must be affirmed.

APPENDIX, Part 2.

ORDER OF COURT.

That in every case where Bail is required to be given, in any cause depending in this Court, a notice in writing of the persons proposed to become bound shall be delivered at the office of the adverse proctor; And no Bail Bond or Recognizance in such cause shall be taken unless the adverse proctor, or some other proctor for him, be then present; or an affidavit be exhibited to prove he has had such notice for the space of twenty-four hours, and been required to attend at the time of giving such Bail, for the purpose of objecting or consenting thereto.

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ADDITIONAL INSTRUCTIONS.

Whereas We have ever been desirous to prevent interruption being given to the trade and commerce of every state in amity with Us, as far as was compatible with the necessary operations of war: And whereas it will tend very much to that purpose, that the trade and navigation of the *Baltic* should for the present remain unmolested: We have therefore been pleased to resolve, that Our ships of war, Privateers, and other vessels acting under Our commission, shall be restrained from making prize of, stopping, or detaining any ships or vessels within the *Baltic*; and We do hereby strictly charge and enjoin the commanders of our ships of war, and the Commanders of all ships and vessels
D D 4 having

APPENDIX.

(a) Lords 13th June 1804, this vessel was also restored on Appeal.

peal, in consideration of the equivocal nature of their character, and the employment in trade, in which they had been actually engaged, and of the occasion for selling arising out of the circumstances attending them, the Lords reversed the sentence of the Court below, and decreed restitution. In the *Raven, Jennings*, (a) a case of a similar description, the vessel had been a *French* privateer, and had been condemned as such at *New York*; but it appeared that the purchaser had bought her for the purposes of trade, and having used his best endeavours to make her fit for that service, had found her unsuitable, and was on that account intending to sell her again.

It will appear from the comparison of these cases, that though the principle of considering the sale of ships of war to the enemy as contraband, is strictly held by the decisions of the Court of Appeal, the application of the principle has been restricted to cases, in which no doubt existed as to the character of the vessel, or the purpose for which they were intended to be sold.

No. II.

FLAG AND PASS OF THE ENEMY.

VROW ELIZABETH, PROBST. Page 2.

Since the decision of the Court of Admiralty in the case of the *Vrow Elizabeth*, where the flag and pass of the enemy was held conclusive against the claim for the ship on behalf of a neutral proprietor, though adopted prior to hostilities, and without any prospect of such an event, the same question has been fully agitated, before the Court of Appeal in several cases, and with a similar result. In the case of the *Diana, Hunt*, (Lords, 1st March 1806) the claim of a *British* merchant for a vessel so employed under a *Dutch* flag and pass, and not coming within the terms of the Order of Council, supra page 7, note, as not sailing before the knowledge of hostilities, but in *September 1803*, was rejected, and the vessel was condemned.

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